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No. 05-

IN THE

Supreme Court of the United States

BRIDGESTONE CORPORATION,
Petitioner,

v.

CITY OF MONROE EMPLOYEES RETIREMENT SYSTEM, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) In this private action alleging violations of the Securities Exchange Act of 1934, did the Sixth Circuit err by becoming the first Circuit to accept the "collective scienter" theory, which – contrary to the Private Securities Litigation Reform Act of 1995 ("Reform Act") – imputes to a corporate defendant the collective knowledge of all its corporate officers and employees, rather than focuses upon whether the corporate officials who participated in the making of the alleged misrepresentation or omission had the requisite state of mind?

(2) Did the Sixth Circuit err by adopting a standard of scienter that allows a plaintiff to state a claim for federal securities fraud based on allegations of mere negligence (based on what a defendant "should have" known) and by relaxing the Reform Act's mandate requiring a plaintiff to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"?

(3) Did the Sixth Circuit err by holding that a corporate defendant commits securities fraud by failing to establish reserves for expenses already paid and accounted for in the company's audited financial statements in accordance with generally accepted accounting principles?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) of the Rules of this Court, a list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner Bridgestone Corporation
(Defendant and appellee in the court below)

Respondent City of Monroe Employees Retirement System
(Plaintiff and appellant in the court below)

Bridgestone/Firestone, Inc.
(Defendant and appellee in the court below)

Yoichiro Kaizaki
(Defendant and appellee in the court below)

Masatoshi Ono
(Defendant and appellee in the court below)

The decision below affirmed the district court's judgment in favor of Yoichiro Kaizaki and Masatoshi Ono. As prevailing parties below, they do not have an interest in the outcome of this petition.

CORPORATE DISCLOSURE STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of this Court's rules, Petitioner Bridgestone Corporation states that it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bridgestone Corporation ("Bridgestone") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit below, which reversed in part the district court's decision dismissing plaintiff's complaint for failure to state a claim.

OPINIONS BELOW

The opinion of the Sixth Circuit dated February 4, 2005 is reported at 399 F.3d 651 (6th Cir. 2005), and appears as Appendix A to this Petition. The court of appeals' February 4, 2005 opinion amended an earlier decision reported at 387 F.3d 468 (6th Cir. 2004), which appears as Appendix B to this Petition. The court of appeals' unpublished order denying the petition for rehearing and suggestion for rehearing en banc appears as Appendix E to this Petition. The opinions of the district court on review appear as Appendix C and D to this Petition.

JURISDICTION

The Court of Appeals entered judgment on February 4, 2005 and denied a timely petition for rehearing and suggestion for rehearing en banc on May 3, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are as follows:

(1) Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a):

> (a) Joint and several liability; good faith defense. Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any

person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(3) Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

(4) Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b):

> (b) Requirements for securities fraud actions.
>
> (1) Misleading statements and omissions. In any private action arising under this title

[15 U.S.C. §§ 78a et seq.] in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind. In any private action arising under this title [15 U.S.C. §§ 78a et seq.] in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title [15 U.S.C. §§ 78a et seq.], state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

STATEMENT OF THE CASE

This case presents important questions of federal law of national (and, indeed, international) importance regarding the proper standard for pleading scienter under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 promulgated thereunder, and the Private Securities Litigation Reform Act of 1995 (the "Reform Act"). The questions presented have deeply divided the federal courts and have given rise to ever increasing splits of authority among the Circuits. This case presents an excellent opportunity to establish much needed uniformity across the Circuits.

In an effort to curb "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer," Congress enacted the Reform Act ten years ago. *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000) (citation omitted). Among other things, the Reform Act created a heightened pleading standard for stating a claim of securities fraud in private litigation. Under that heightened standard, a complaint must identify the corporate officials responsible for the alleged misstatement or omission *and* plead with particularity that each misstatement or omission was made with the requisite scienter.

The Sixth Circuit's decision below runs directly counter to this congressional mandate requiring specific, particularized allegations of scienter against officials who participate in alleged misstatements or omissions on behalf of a corporation. In reinstating plaintiff's claims against Bridgestone, the Sixth Circuit separated itself from every other Circuit by holding that Bridgestone was "at least reckless" based upon allegations that amount to no more

than mere negligence, *i.e.* that Bridgestone "*should have* [been] more attuned to the likelihood, or at least *non-trivial, contingent possibility*, of a major financial hit to Firestone [its subsidiary]," and "Bridgestone knew or *should have known* that it was taking heavy losses via claims settlement resulting from alleged problems with [Firestone] ATX tires." (Apx. A at 67a, 70a (emphasis added).)

The Sixth Circuit also repudiated the sound decisions of the Fifth and Ninth Circuits rejecting the theory of "collective scienter." In stark contrast to other Circuits, the court below adopted the theory of "collective scienter," which determines a corporate defendant's intent by looking not to the state of mind of the corporate officials who participate in allegedly fraudulent statements, but to the collective knowledge of its officers and employees – regardless of whether they participated in making the statement or omission, and regardless of whether any of those officers or employees had scienter. Indeed, in this case, the Sixth Circuit held that Masatoshi Ono (Firestone's then CEO and a nominal Bridgestone officer) had no scienter and affirmed dismissal of the case as to him. But, at the same time, the Sixth Circuit imputed the alleged knowledge of Mr. Ono to Bridgestone and found scienter as to Bridgestone.

Finally, the Sixth Circuit held that the complaint stated a claim against Bridgestone for securities fraud because Bridgestone did not establish "reserves" for expenses already paid and reflected in its audited statements. The Sixth Circuit's decision is in direct conflict with the heightened standard for pleading scienter under the Reform Act. The decision also conflicts with the law of this Court and other Circuits and, indeed, conflicts with generally accepted accounting principles ("GAAP").

This case will allow this Court to clarify the basic standards for pleading scienter under Section 10(b) and the Reform Act and to provide guidance and clarity to the lower courts on these issues of national importance under the federal securities laws.

A. Factual Background.

This case arises from alleged violations of federal securities laws relating to a voluntary recall by Bridgestone/Firestone, Inc. ("Firestone") in August 2000 of approximately 6.5 million allegedly defective Radial ATX, ATX II, and Wilderness AT tires (collectively, the "ATX tires") mounted on Ford Explorer sport utility vehicles made by Ford Motor Company.

Bridgestone is a Japanese corporation with headquarters in Tokyo, Japan. Among other things, Bridgestone designs, manufactures, and sells tires, tubes, chemicals, and other industrial products. Bridgestone and its subsidiaries manufacture several brands of tires, including the Bridgestone, Firestone, Dayton, and Road King brands and several private-label house brands.

Bridgestone stock trades only on Japanese stock exchanges. In the United States, unsponsored American Depositary Receipts ("ADRs") issued by United States depositary banks trade on over-the-counter markets and are not listed on any American exchange. Consequently, Bridgestone is not required to and does not register its securities in the United States with the Securities and Exchange Commission ("SEC"). Nor does it file its financial statements and annual reports with the SEC. *See* 17 C.F.R. § 240.12g3-2(b).

In 1988, Bridgestone acquired all the stock of The Firestone Tire & Rubber Company.[1] At the time this lawsuit was filed, Firestone was an Ohio corporation with its headquarters in Nashville, Tennessee.

Although Firestone is a wholly-owned subsidiary of Bridgestone, Bridgestone and Firestone are separate and independent corporations. Firestone designed, manufactured, sold, and had responsibility for the ATX tires used as original equipment on Ford's Explorer sport-utility vehicle.

On August 9, 2000, Firestone announced a voluntary recall of approximately 6.5 million Firestone ATX tires mounted on Ford Explorers. The recall did not involve any tires manufactured by Bridgestone. The announcement of Firestone's voluntary recall triggered a decline in the price of Bridgestone shares on the Tokyo Exchange and precipitated this suit.

B. Proceedings Below.

On January 4, 2001, plaintiff City of Monroe Employees Retirement System filed a putative class action complaint in the Middle District of Tennessee against Bridgestone, Firestone, Bridgestone's former chief executive officer Yoichiro Kaizaki, and Firestone's former CEO Masatoshi Ono. The complaint alleged that the defendants made material misstatements and omissions in violation of Section

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[1] The Firestone Tire & Rubber Company, founded in 1900, changed its name to Bridgestone/Firestone, Inc., after it was acquired in 1988. After this lawsuit was filed, Bridgestone/Firestone, Inc. underwent further corporate restructuring. Both Bridgestone/Firestone, Inc. and its successor are referred to herein as "Firestone."

10(b) of the Exchange Act and Rule 10b-5 thereunder. On January 22, 2001, plaintiff Patricia Ziemer filed a similar complaint.

The district court consolidated the two actions on April 10, 2001. On May 11, 2001, plaintiff filed a consolidated complaint. The consolidated complaint incorporated new factual allegations and purported to add a control person liability claim under Section 20(a) of the Exchange Act against the defendants (other than Mr. Ono). All defendants moved to dismiss the consolidated complaint for failure to state a claim.

1. The District Court's Decision.

In a well-reasoned sixty-one page opinion, the district court granted defendants' motions and dismissed the consolidated complaint with prejudice. The district court held that the complaint failed to state a claim under Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5. (Apx. D at 202a-203a, 208a, 213a-214a, 220a.) The district court also concluded it lacked both general and specific jurisdiction over Bridgestone's former CEO, Mr. Kaizaki. (Apx. D at 186a-190a, 220a.)

The district court held that none of Bridgestone's alleged statements or omissions were material and actionable. (Apx. D at 209a.) With respect to the statements contained in Bridgestone's 1996-1999 Annual Reports that plaintiff claimed were false and misleading, the district court correctly concluded that these statements are either true or general statements of confidence and self-praise that are immaterial as a matter of law. (Apx. D at 205a-207a.) None of the statements even mentions Firestone's ATX tires. The district court similarly found that plaintiff alleged "*no* facts to show that Bridgestone's 'hard' statements were

fraudulent." (Apx. D at 208a.) It also held that plaintiff "failed to make a prima facie showing that Bridgestone knew to a 'substantial certain[ty]' that Firestone's tires were defective," and thus "Bridgestone was under no duty to speculate about potential problems with its subsidiary's tires that were not yet known." (Apx. D at 202a-203a.)

Further, the district court concluded that plaintiff failed to allege facts supporting a "strong inference" of scienter against Bridgestone. Among other things, the district court determined that plaintiff "failed to plead with particularity any facts establishing a strong inference that Bridgestone should have 'considered probable' a Firestone recall and thus established a huge contingent liabilities fund." (Apx. D at 204a.) The district court noted that the complaint did *not* allege that any Bridgestone executive engaged in insider trading, made any public statement inconsistent with Bridgestone's internal conduct or beliefs, or engaged in any other alleged activity that would produce a "strong inference" that Bridgestone was acting recklessly or fraudulently. (Apx. D at 212a.)

Similarly, the district court dismissed the claims in the complaint against Mr. Kaizaki, Firestone, and Firestone's former CEO, Mr. Ono, for failure to state a claim, including a failure to state particularized facts supporting scienter. (Apx. D at 220a.)

2. The Sixth Circuit's Amended Decision.

On February 4, 2005, a panel of the Sixth Circuit affirmed in part and reversed in part the district court's dismissal of plaintiff's claims against the defendants. The appellate court's February 4, 2005 opinion amended an earlier opinion dated October 22, 2004 that improperly

attributed certain documents and actions to Bridgestone that are actually alleged against Firestone.[2]

The Sixth Circuit affirmed the district court's dismissal of all of the claims *actually* pled against Bridgestone. The Sixth Circuit agreed that plaintiff failed to state a claim against Bridgestone with respect to the statements that formed the basis for the claims alleged in the complaint. (Apx. A at 46a.) Inexplicitly, though, the Sixth Circuit created a brand new theory of liability neither pled nor advocated by plaintiff. It *sua sponte* held that there were two other "effective representations" implied in Bridgestone's 1999 Annual Report which were actionable:

> (1) *That no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions.* The Sixth Circuit concluded that Bridgestone should have known in the spring of

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[2] In its amended opinion, the Sixth Circuit agreed with Bridgestone that references to purported Bridgestone documents and actions noted in the original opinion were incorrect because they were actually the documents and alleged actions of Firestone. Nevertheless, despite correcting some (though not all) of these factual inaccuracies, the Sixth Circuit's amended opinion erroneously continues to rely upon those very documents and actions of *Firestone* in finding that Bridgestone's statements were inconsistent. This practice violates the Reform Act, disregards the separate corporate form of each company, and is contrary to the well-established rule that a subsidiary's alleged fraud cannot be automatically imputed to its corporate parent. *See, e.g., In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 554 (6th Cir. 1999); *Chill v. General Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996) (a parent is not vicariously liable for the securities fraud of its subsidiary).

> 2000 that the Firestone brand would be impaired, even though the Sixth Circuit simultaneously rejected plaintiff's pled liability theory and concluded that Bridgestone could not have been aware of the subsequent ATX tire recall at the time it released its 1999 Annual Report (although it was the announcement of Firestone's recall in August 2000 that impaired the Firestone brand). The Sixth Circuit thereby inconsistently held that the very recall that Bridgestone could *not* have been aware of was in fact one that Bridgestone *should have* known was substantially certain to occur; and
>
> (2) *That there were no actual, material losses connected to the pre-2000 lawsuits and responses to the regulatory scrutiny as to the ATX tires.* The Sixth Circuit held that this was an actionable "misrepresentation" because no reserves had been set up to cover the very expenses *already* reported and recorded accurately, in accordance with GAAP, in the financial statements that accompanied Bridgestone's 1999 Annual Report.

(Apx. D at 46a-55a.)

The Sixth Circuit further held that plaintiff had pled scienter as to Bridgestone, even though plaintiff failed to plead any facts showing that any Bridgestone officer or employee participated in making a false, misleading statement or omission with scienter. To conclude that Bridgestone had acted with the requisite scienter, the Sixth Circuit relied on the alleged "knowledge" of Mr. Ono, Firestone's then CEO and a nominal Bridgestone executive vice president. (Apx. A at 66a-69a.) However, the Sixth Circuit affirmed the dismissal of plaintiff's claims against Mr. Ono for failure to plead scienter adequately, in part

because there was no allegation that Mr. Ono had played any role in making any allegedly actionable statement. (Apx. A at 72a-73a.) Indeed, the Sixth Circuit expressly found that the complaint "does not allege by direct allegation or even upon information and belief that Ono played *any* role in drafting, reviewing, or approving" Bridgestone's 1999 Annual Report, which is the source of the statements found actionable. (Apx. A at 73a (emphasis added).)

Despite this conclusion, the Sixth Circuit held that plaintiff had pled scienter adequately against Bridgestone by imputing Mr. Ono's alleged knowledge to Bridgestone – a juxtaposition that the court admitted was "seem[ingly] incongruous." (Apx. A at 73a n.34.) In other words, the Sixth Circuit concluded that Mr. Ono lacked the requisite scienter, but held solely upon the basis of Mr. Ono's knowledge that Bridgestone had the requisite scienter.

REASONS FOR GRANTING THE WRIT

Supreme Court review is warranted for several compelling reasons. First, this Court should reverse the Sixth Circuit's adoption of the "collective scienter" theory because it directly conflicts with decisions of the Fifth and Ninth Circuits (as well as numerous district courts) which already have repudiated the theory as incompatible with the Reform Act. Second, the decision below adopts an improper standard for pleading scienter that allows plaintiffs to state a claim for securities fraud based merely on allegations of negligence, including, *e.g.*, "*should have* known," "*should have* been particularly attuned to the *possibility* of defect-caused problems from ATX tires," and "*should have* made Bridgestone more attuned to the likelihood, or at least *non-trivial, contingent possibility*, of a major financial hit to Firestone." (Apx. A at 67a, 70a.) That is contrary to this Court's precedent. It is also contrary to the law of the Circuits, which requires either intentional

conduct or some form of "recklessness" amounting to something far in excess of mere negligence. Third, the Sixth Circuit erred by adopting, in direct conflict with the First Circuit, an improper and unworkable standard that requires the establishment of *future* reserves for expenses already paid for and accounted for in accordance with GAAP in a company's audited financial statements. This Court's intervention is needed to establish a uniform pleading standard under the Reform Act and to resolve the ever-growing splits of authority among the Circuits on important questions of scienter in federal securities legislation.[3]

I. THIS COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY REGARDING THE "COLLECTIVE SCIENTER" THEORY.

In the decision below, the Sixth Circuit adopted the discredited and widely criticized "collective scienter" theory, which determines a corporate defendant's intent by looking not to the state of mind of the individual corporate officials who participate in the alleged misrepresentation or omission, as required by the Reform Act, but rather to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment. The Sixth Circuit's approach is fundamentally incompatible with the Reform Act and directly conflicts with the decisions of the Fifth and Ninth Circuits.

Under the heightened pleading requirements of the Reform Act, a complaint must "state with particularity facts

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[3] The Sixth Circuit's decision also should be reviewed for the reasons set forth in Bridgestone/Firestone North American Tire, L.L.C.'s Petition for a Writ of Certiorari, filed on August 1, 2005.

giving rise to a *strong inference* that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (emphasis added). To be actionable under the Reform Act, a statement that is alleged to be false and misleading must be made with scienter (reckless or intentional conduct) by one or more *individuals* on behalf of the corporation. The complaint must identify the individual corporate officials responsible for the alleged misstatement or omission *and* plead with particularity that each made the misstatement or omission with the requisite scienter. Only then may a corporation be liable. *See Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 366 (5th Cir. 2004).

The decision below runs counter to these basic requirements of the Reform Act. In its scienter analysis, the Sixth Circuit did not identify any individual Bridgestone official who made or issued the statements found actionable by the court in Bridgestone's 1999 Annual Report and who had the required state of mind. Indeed, plaintiff has failed to plead *any* facts showing that any Bridgestone officer or employee made a false or misleading statement with the requisite scienter – or, indeed, that any Bridgestone officer or employee possessed the "required state of mind." Instead, the court of appeals erroneously "collected" and imputed to Bridgestone the purported "knowledge" of Firestone's former CEO, Mr. Ono, who – the Sixth Circuit agreed – did not "play[] *any role* in drafting, reviewing, or approving" Bridgestone's 1999 Annual Report, and whose dismissal from this case was affirmed by the Sixth Circuit on the ground that he lacked scienter. (Apx. A at 29a n.17, 73a (emphasis added).) Only this novel and illogical reasoning allowed the court below to conclude erroneously that Bridgestone acted with scienter.

In other words, the Sixth Circuit held that Bridgestone acted with fraudulent intent, even though plaintiff failed to

plead that any officer or employee of Bridgestone acted with the requisite scienter. In doing so, the Sixth Circuit adopted the "collective scienter" theory, in direct conflict with the Fifth and Ninth Circuits, which have expressly rejected collective scienter as contrary to the Reform Act.

Shortly before the Sixth Circuit's original decision, the Fifth Circuit rejected the theory of "collective scienter" in *Southland Securities Corp. v. INSpire Insurance Solutions Inc.*, 365 F.3d 353, 366 (5th Cir. 2004). The Fifth Circuit held that whether a corporate defendant has acted with scienter is determined by looking to the state of mind of the individual corporate official or officials who make or issue the statement:

> For purposes of determining whether a statement made by the corporation was made by it with the requisite Rule 10(b) scienter *we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement* (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) *rather than generally to the collective knowledge of all the corporation's officers and employees* acquired in the course of their employment.

Id. (citations and footnote omitted) (emphasis added).

The Fifth Circuit held that where no single corporate official has the requisite scienter, the Reform Act forecloses aggregating the collective knowledge of a corporation's employees:

> While . . . a corporation may be charged with the collective knowledge of its employees, it

> does not follow that the corporation may be deemed to have a culpable state of mind when that state of mind is possessed by no single employee. A corporation can be held to have a particular state of mind *only when that state of mind is possessed by a single individual.*

Id. at 367 (quotation omitted) (emphasis added).

In addition to the Fifth Circuit, the Ninth Circuit has also rejected the collective scienter theory. In *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424 (9th Cir. 1995), the Ninth Circuit recognized that "there is no case law supporting an independent 'collective scienter' theory." *Id.* at 1435; *see also in re Apple Computer, Inc. Sec. Litig.*, 243 F. Supp. 2d 1012, 1023 (N.D. Cal. 2002) ("A defendant corporation is deemed to have the requisite scienter for fraud *only if the individual corporate officer making the statement has the requisite level of scienter* . . . . The Ninth Circuit has rejected the concept of 'collective scienter' in attributing scienter to a corporation.") (emphasis added).[4]

The collective scienter theory directly contradicts the Reform Act by eliminating the requirement that a corporate defendant's officers who make a statement must have

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[4] The significance of the Sixth Circuit's decision was immediately recognized. *See* Lyle Roberts, *Sixth Circuit Embraces Collective Scienter*, 10b-5 DAILY (October 22, 2004) (noting that the Sixth Circuit departed from the view that corporations act only through their officers and directors and, therefore, can only be held liable for fraud if one or more of those individuals can be held liable for fraud: "The court concluded that scienter was adequately plead[ed] against Bridgestone and Firestone, even though it failed to identify any individual officers or directors who acted with scienter."). (Apx. F at 229a.)

scienter before their state of mind can be imputed to a corporation. *See Southland*, 365 F.3d at 366. If there is no scienter on the part of any executive officer of the company who made or approved the financial statements, as is the case here, it follows that there should be no liability for the issuer.

In this regard, "collective scienter" not only conflicts with the Reform Act, it also conflicts with the general common law rule applicable to allegations of fraud that "the required state of mind must actually exist in the individual making (or being a cause of the making of) the misrepresentation, and may not simply be imputed to that individual on general principles of agency." *Southland*, 365 F.3d at 366 (citing Restatement (Second) of Agency § 275, comment b; § 268 comment d). Here, there is no allegation that anyone at Bridgestone responsible for the 1999 Annual Report acted with scienter. The district court concluded that Bridgestone's CEO, Mr. Kaizaki, had not acted with scienter, and that conclusion was not disturbed on appeal. (Apx. D at 225a.) Further, as already noted, the Sixth Circuit affirmed the dismissal of Firestone's former CEO, Mr. Ono, since he played no role in the issuance of any statement pled by plaintiff.

The Sixth Circuit's embrace of the collective scienter theory has far-reaching implications. The court has created a new, watered-down standard by which to gauge a corporate defendant's alleged scienter – a standard that makes a corporation liable for any claimed knowledge of anyone within a corporate group of companies, even if none of them individually have a culpable state of mind. As a result of the decision below, collective scienter will now be used in the Sixth Circuit to determine whether a corporation may be liable for securities fraud even where none of its officers or employees acted with scienter. That standard

cannot be reconciled with the Reform Act or the law of any other Circuit.

II. THE DECISION BELOW PRESENTS NUMEROUS ISSUES ON WHICH THE CIRCUITS ARE IN CONFLICT REGARDING THE SUBSTANTIVE AND PROCEDURAL ASPECTS OF SCIENTER.

By allowing a plaintiff in the Sixth Circuit to plead scienter with allegations that amount to no more than mere negligence, the decision below also has created a conflict with the law of this Court and the law of every other Circuit, which recognizes that scienter consists of more than negligence. This stark relaxation of the "recklessness" standard is unprecedented. The decision below also has exacerbated another conflict (creating at least a four-way split among the Circuits) regarding the proper standard for pleading scienter under the Reform Act.

A. The Decision Below Conflicts with the Law of this Court and the Circuits Recognizing that Scienter Consists of More Than Mere Negligence.

In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), this Court made clear that negligence is insufficient to prevail in a private cause of action under Section 10(b) and Rule 10b-5. *Id.* at 193. This Court concluded that a plaintiff must prove that the defendant acted with a level of scienter akin to "a mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 193 n.12. At the same time, the Court expressly refused to address whether "reckless behavior" in certain instances would satisfy the scienter requirement. *Id.*

Although the Circuits after *Hochfelder* have reached a general consensus that recklessness is sufficient to state a claim under the federal securities laws, the courts nonetheless have disagreed over the precise contours of that recklessness. Some Circuits have allowed a form of recklessness approaching gross negligence to be sufficient, while other Circuits have held that conscious disregard or deliberate recklessness is required.[5]

One formulation of the recklessness required is the definition set forth by the Seventh Circuit in *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977), where the court stated "reckless conduct may be defined as a highly unreasonable omission, *involving not merely simple, or even inexcusable negligence, but an extreme departure from the ordinary standards of ordinary care*, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id.* at 1045 (citation omitted) (emphasis added).

The lack of guidance on the meaning of "recklessness" has led to confusion among the lower courts and an unfair divergence of outcomes across litigants in different Circuits. As one of the principal drafters of the Reform Act has remarked, "[a]s matters now stand, some courts require plaintiffs to plead mere 'recklessness,' whatever that means,

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[5] *See, e.g., Bryant v. Avada Brands, Inc.* 187 F.3d 1271, 1283 (11th Cir. 1999) (requiring "severe recklessness"); *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 977 (9th Cir. 1999) (requiring "deliberate recklessness"); *Hoffman v. EstaBrook & Co.*, 587 F.2d 509, 516 (1st Cir. 1978) (approving definition of recklessness as "carelessness approaching indifference").

while others require '*conscious* disregard' or '*deliberate* recklessness.' This uncertainty has turned the litigation of motions to dismiss and for summary judgment in securities class actions into a game of roulette, the outcome of which depends on how a particular judge defines recklessness in a particular case." Robert J. Giuffra, Jr., "Pleading Scienter under the PSLRA," N.Y.L.J. (July 22, 1999).

One thing, however, is clear. Despite the continued uncertainty over the meaning of "recklessness," no Circuit Court has ever held – at least until now – that mere negligence suffices to plead scienter. *See, e.g., Ottmann v. Hanger Orthopedic Group*, 353 F.3d 338, 343 (4th Cir. 2003) (stating that every court of appeals has concluded that scienter may be established by a showing of recklessness, and that "[m]ere negligence will not suffice") (collecting authorities) (citation omitted). Indeed, such a holding conflicts directly with this Court's decision in *Hochfelder*, which forecloses negligence-based liability under the federal securities laws.

The court below, however, adopted a standard that amounts to mere negligence, at best, by concluding that Bridgestone "should have known" of facts giving rise to an inference of scienter. Repeatedly throughout its opinion the panel emphasized the negligence-based standard it adopted:

- "Two facts reinforce the notion that Bridgestone knew ***or should have known*** that it was taking heavy losses via claims settlement resulting from alleged problems with the ATX tires." (Apx. A at 70a (emphasis added));

- "Bridgestone ***should have been*** particularly attuned to the ***possibility*** of defect-caused problems from ATX tires manufactured at [Firestone's] Decatur

plant in light of its awareness of the strike and the round-the-clock production schedule . . . ." (Apx. A at 70a (emphasis added));

- "[T]he facts known ***or available*** to Bridgestone ***were seemingly in tension*** with the representation that no impairment risk of Bridgestone's corporate assets was substantially certain to occur . . . ." (Apx. A at 66a (emphasis added));

- "This history [a prior recall by Firestone] was in the known corporate background and ***should have made*** Bridgestone more attuned to the likelihood, ***or at least non-trivial, contingent possibility***, of a major financial hit to Firestone . . . ." (Apx. A at 66-a67a (emphasis added).)

A "should have known" standard is, of course, a negligence standard, and it conflicts with the law of this Court and the law of the Circuits. Never before has any Circuit concluded that a claim of securities fraud is actionable based on a "non-trivial, contingent possibility, of a major financial hit" to a company's subsidiary.

In fact, the court below adopted such a relaxed definition of scienter that it falls below even simple negligence. For example, the Sixth Circuit improperly held that scienter could be pled merely by alleging that Bridgestone had or *potentially* had *access* to information that the complaint alleges belonged to its wholly owned subsidiary in the United States, Firestone, which is a separate and independent corporation from Bridgestone:

- "[S]ignificantly, much of the evidence that the Complaint relies on as establishing that the asset was impaired or likely to suffer impairment

became fully available after March of 1999 . . . ." (Apx. A at 55a-56a (emphasis added));

- "[T]he facts known *or available to Bridgestone* were seemingly in tension with the representation that no impairment risk of Bridgestone's corporate assets was substantially certain to occur . . . ." (Apx. A at 66a (emphasis added).)

By reversing the judgment of the district court on the basis of information that Bridgestone *might* have known, the court below employed a standard that is even less demanding than negligence. Of course, the Reform Act and the law of this Court and every other Circuit require much more.

In this respect, the decision below also conflicts with decisions in other Circuits that hold that allegations of a corporation's *potential* access to documents or information do not give rise to a strong inference of scienter – particularly when the potentially accessible information is located at one of a company's numerous foreign subsidiaries. *See, e.g., In re Alpharma Sec. Litig.*, 372 F.3d 137, 151 (3d Cir. 2004) ("[T]he mere fact that the information was sent to Alpharma's headquarters and therefore was available for review by the individual defendants is insufficient to 'give rise to a strong inference that [defendants] acted with the required state of mind.'") (citation omitted); *see also Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 829 (8th Cir. 2003) (rejecting the significance of a pleaded chart "because there is no assertion that the defendants had access to it or to the synthesized information it contained and chose to disregard it at the time the statements of compliance were made").

This Court's review is necessary to resolve the uncertainty over whether recklessness does in fact suffice to plead federal securities fraud (the question left open in *Hochfelder*) and, if so, what "recklessness" actually means (a question with which the Circuits have struggled and which the Sixth Circuit has now answered in an unprecedented and erroneous way).

B. Supreme Court Review is Necessary to Resolve the Growing Split Among the Circuits Regarding What a Plaintiff Must Allege to Support a "Strong Inference" of Scienter under the Reform Act.

When Congress enacted the Reform Act in 1995, it never defined the "strong inference" of scienter that must be pled to survive a motion to dismiss. As a result, a three-way split of authority emerged among the Circuits over what a plaintiff must allege to survive a motion to dismiss. This split has only deepened and become more pronounced over time. In the decision below, the Sixth Circuit staked out a new *fourth* position regarding the "strong inference" requirement under the Reform Act. Without this Court's review, the Circuits will remain hopelessly divided on the issue, with the result that whether a securities fraud claim survives a motion to dismiss will often turn on the law of the particular Circuit in which suit happens to be filed.

Lacking clear guidance from this Court, several different interpretations of the Reform Act's heightened pleading requirements for scienter have developed. The Second, Third, and Eighth Circuits have held that a strong inference of scienter may be pled by either alleging facts establishing motive and opportunity to commit fraud, or by alleging facts that constitute circumstantial evidence of conscious misbehavior or recklessness. *See, e.g., Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999); *In re*

Advanta Corp. Sec. Litig., 180 F.3d 525, 534-35 (3d Cir. 1999); *In re K-tel Int'l Sec. Litig.*, 300 F.3d 881, 894 (8th Cir. 2002).

In contrast, the Ninth Circuit has adopted a strict pleading standard under the Reform Act. It has held that allegations of "mere 'motive and opportunity' or 'recklessness'" fail to meet the Reform Act's heightened pleading standard, stating that the Reform Act "requires plaintiffs to plead, at a minimum, particular facts giving rise to a strong inference of deliberate or conscious recklessness." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 979 (9th Cir. 1999).

Yet a third approach to the "strong inference" requirement has emerged in the First, Fourth, Fifth, Tenth, and Eleventh Circuits, which generally hold that to plead the requisite state of mind a plaintiff must allege facts giving rise to a strong inference of scienter, but that allegations of motive and opportunity may not, by themselves, rise to that level in any particular case. *See, e.g., Greebel v. FTP Software, Inc.*, 194 F.3d 185, 197 (1st Cir. 1999); *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 412 (5th Cir. 2001); *City of Philadelphia v. Fleming Cos., Inc.*, 264 F.3d 1245, 1249, 1262 (10th Cir. 2001); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285 (11th Cir. 1999).[6]

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[6] Even this third group of Circuits, however, has not adopted an entirely uniform approach to the "strong inference" requirement. In part, this is because courts in these Circuits engage in a case-by-case analysis to determine whether the facts pled demonstrate the required level of scienter. *See, e.g., Ottmann*, 353 F.3d at 345 (adopting a "flexible, case-specific analysis" that examines the totality of the circumstances rather than follows any specific pleading test).

As a result of the relaxed standard adopted by the decision below, the Sixth Circuit has now staked out a new fourth position, distancing it from the other Circuits by allowing plaintiffs to state a claim for securities fraud based simply on allegations of negligence (or even less) and without any need for a strong inference of the required state of mind.

This Court's review is urgently needed to correct the decision below and to bring uniformity to the law of the Circuits, which remain deeply divided over the proper substantive definition of recklessness and the procedural standards for pleading scienter, notwithstanding ten years of litigation under the Reform Act.

III. THE SIXTH CIRCUIT HAS ADOPTED A NEW ACCOUNTING STANDARD THAT IS UNWORKABLE UNDER GAAP AND CREATES A CONFLICT WITH THE LAW OF OTHER CIRCUITS.

Plaintiff pleaded and argued a single theory of accounting fraud against Bridgestone: that Bridgestone had an obligation under GAAP to reserve for the August 2000 ATX tire recall. However, both the district court and the Sixth Circuit concluded that plaintiff's pleaded theory was insufficient to state a securities fraud claim. The Sixth Circuit determined that Bridgestone could not have known about the tire recall at the time it issued its 1999 Annual Reports because that annual report was "too distant in time" from the recall. (Apx. A at 68a.) Nonetheless, the court inexplicably and inconsistently held that Bridgestone should have advised its shareholders at the time it issued its 1999 Annual Report that the Firestone brand was impaired (although that did not happen, if at all, until the announcement of the then unknowable August recall months later).

The court also erroneously recharacterized plaintiff's theory of accounting fraud under U.S. GAAP and held that: "Because the 1999 Annual Report represented that there were *no actual losses* connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires' failures, there was a duty to disclose any material information to the contrary, be it in the form of a reserve, notice of a contingency, or some other form of disclosure." (Apx. A at 54a-55a (emphasis added).) In fact, there were actual losses, and they were reflected in Bridgestone's financials. Indeed, Bridgestone's attached 1999 financial statements necessarily reflected all actual losses in 1999; there is not (nor can there be) an allegation to the contrary. Nor was there any allegation that the 2000 financial statements did not reflect all actual losses. There is no need under GAAP to establish reserves or notify of contingencies when the losses are already being booked when incurred in the ordinary course of business.

Nevertheless, the court below held that the Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 5 ("FASB 5") requires establishment of a future contingency or reserve for *actual* past payments Bridgestone had *already* accounted for and reported in its financial statements. (Apx. A at 54a.) The Sixth Circuit's reasoning is seriously flawed because the 1999 financial statements already necessarily reflected the "actual losses" incurred in 1999. There was no allegation to the contrary. Nor was there any allegation that such losses were material for an $18 billion company such that they should have been set forth in some way different from the way in which they were presented in Bridgestone's financials.

Not only does the Sixth Circuit's decision misinterpret FASB 5, but it also conflicts with the law of the First Circuit. *See Greenstone v. Cambex Corp.*, 975 F.2d 22 (1st Cir.

1992) (Breyer, J.). In *Greenstone*, the First Circuit held that FASB 5 applies only to future, "unasserted" claims – not claims already reflected in a company's financial statements. *Id.* at 24. Instead of transparency and accuracy in financial reporting, the Sixth Circuit has created an unworkable new disclosure standard that conflicts with GAAP by incorrectly requiring the establishment of a "future" reserve for actual past payments *already* made, accounted for, reported and disclosed in financial statements.[7]

This new law of Sixth Circuit accounting hopelessly conflicts with GAAP. The Sixth Circuit now requires an accounting treatment with which a public accountant cannot comply because it is contrary to GAAP, the basic accounting standards governing the accounting profession. Public companies will not be able to comply with the Sixth Circuit's new requirement and simultaneously have their financial statements audited and certified as required by GAAP, SEC rules, the stock exchanges, and the Sarbanes-Oxley Act, among other requirements.

This Court's review is necessary to resolve the conflict among the Circuits on this point. The need is made only more urgent because the decision below conflicts with the Reform Act's scienter standard and therefore eviscerates the congressional intent to make it more difficult (not easier) to state claims for federal securities fraud against companies – particularly here where there was no insider trading or any other motive for Bridgestone to deceive its shareholders.

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[7] Notably, Bridgestone has not been required to make (and has not made) any adjustments to or restatements of the financial statements contained in its 1999 Annual Report.

CONCLUSION

The outcome of a motion to dismiss a private securities fraud action should not turn on the particular Circuit where suit is brought. This Court's review is necessary to clarify the most basic of standards for pleading scienter under the Reform Act and to resolve the latest conflicts among the Circuits created by the Sixth Circuit's decision below.

Respectfully submitted,

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August 1, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-5505

[Filed February 4, 2005]

CITY OF MONROE EMPLOYEES RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated, Plaintiff-Appellant,	)
v.	)
BRIDGESTONE CORPORATION; BRIDGESTONE/FIRESTONE, INC.; YOICHIRO KAIZAKI; MASATOSHI ONO, Defendants-Appellees.	)

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 01-00017
Robert L. Echols, Chief District Judge

Before: KEITH and CLAY, Circuit Judges; OBERDORFER, Senior District Judge.[1]

AMENDED OPINION

OBERDORFER, Senior District Judge. In this appeal, we review the district court's dismissal with prejudice of a securities fraud class action Consolidated Complaint ("Complaint") filed by investors in Bridgestone Corporation ("Bridgestone") against Bridgestone, its subsidiary Bridgestone/Firestone, Inc. ("Firestone"), Bridgestone Chief Executive Officer ("CEO") Yoichiro Kaizaki, and Bridgestone Executive Vice President and Firestone CEO Masatoshi Ono. The district court dismissed the claims against Kaizaki for lack of personal jurisdiction and dismissed the claims against Bridgestone, Firestone and Ono for failure to state a claim upon which relief could be granted. For the reasons stated below, we affirm in part, reverse in part, and remand.

I. BACKGROUND

We assume the truth of the following facts for the purpose of this appeal. Unless otherwise indicated, they are drawn from the Complaint.

Bridgestone, a multi-national corporation with its international headquarters in Japan, is the world's largest tire manufacturer. Bridgestone's stock trades in Japan on the Tokyo Stock Exchange. Bridgestone's stock does not trade on any American stock exchange. Accordingly, Bridgestone is

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[1] The Honorable Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

not required to register its equity securities with the United States Securities & Exchange Commission ("SEC"). Bridgestone's stock trades in the United States on the over-the-counter, or "OTC," market. The OTC market is an American market for foreign-issued securities not traded on any domestic stock exchange.[1]

Bridgestone operates in the United States through its regional corporate headquarters in Nashville, Tennessee, and through its wholly owned subsidiary Firestone. Firestone's corporate headquarters are in Nashville. Firestone's largest tire production facility is in Decatur, Illinois.

From 1993 to 2001, Yoichiro Kaizaki was Bridgestone's President and CEO. In January 2001, he resigned from both positions. Kaizaki is now retired and resides in Japan. From 1993 to October 2000, Appellee Masatoshi Ono was the Executive Vice-President of Bridgestone and CEO of

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[1] *See* the National Association of Securities Dealers, Inc. ("NASD") website, <http://www.nasd.com/resources/glossary>. *See generally New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) ("A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice."), *cert. denied*, 540 U.S. 1183, 124 S. Ct. 1424, 158 L. Ed. 2d 87 (2004); Fed. R. Evid. 201 (providing that "[a] court may take judicial notice, whether requested or not" of a "judicially noticed fact" which "must be one not subject to reasonable dispute," a requirement satisfied if the fact is "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

Firestone. In October 2000, Ono resigned from both positions.

Lead Class Plaintiff City of Monroe Employees Retirement System ("the Retirement Fund") is, like all class members, a purchaser of Bridgestone common stock or American Depository Receipts[2] for Bridgestone common stock between March 31, 1998 to August 31, 2000. The allegations in the Retirement Fund's Complaint relate to events dating back to 1978.

In that year, Firestone's "Firestone 500" tire was the leading steel-belted radial tire brand. In 1978 and 1979 combined, Firestone manufactured approximately 14,000 defective Firestone 500 tires, resulting in hundreds of passenger vehicle crashes and 41 fatalities. Initially, Firestone publicly attributed the known failures to consumers' failure to properly inflate or take care of their tires. Government investigators subsequently determined that Firestone had added too much of an adhesion-boosting compound to the rubber that held the steel belts together, resulting in rubber tire tread separating from underlying steel belts, eventually leading to the tires suddenly falling apart. As a result, in 1979, Firestone paid a $500,000 fine imposed by the National

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[2] An American Depository Receipt, or "ADR," represents ownership in a security issued by a foreign company in foreign markets. Typically, a United States depository bank has custody of the security corresponding to an ADR and issues the ADR certificate to a United States investor. *See generally* Edward F. Greene, et al., U.S. Regulation of the International Securities and Derivatives Markets, § 2.02 (2000); Fed. R. Evid. 201 (authorizing, and providing standards for, taking judicial notice). Each Bridgestone ADR represents ten shares of Bridgestone common stock. *See* Joint Appendix ("App.") at 140.

Highway Traffic Safety Administration ("NHTSA"),[3] the then-largest-ever fine imposed by the NHTSA, and instituted a recall from consumers of 13 million Firestone 500 tires. The recall injured Firestone's corporate image, brand, and financial performance. App. at 143 (Complaint).

In 1988,[4] Bridgestone acquired Firestone for $2.6 billion. Upon acquiring Firestone, Bridgestone sought to increase Firestone's revenue by expanding its contractual relationship with Ford Motor Company ("Ford"), a leading American automobile manufacturer.

In 1988 and 1989, Ford was developing the Explorer, a new sport-utility vehicle. Firestone sought to obtain the tire supply contract for the Explorer. Towards that end, Firestone, in 1989, submitted prototypes of its ATX tires to Ford for testing.[5] An outside company tested seventeen of the prototypes. In February 1989, the outside testing company reported that five of the seventeen prototypes had failed due to tread separation problems under heavy loads and strenuous conditions.

In March 1990, Ford introduced the new Explorer, equipped with Firestone ATX tires. Between 1990 and 1993, Ford sold over 300,000 Explorers per year. By 1993, Ford had become Firestone's leading customer as measured by

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[3] The NHTSA is an administration within the United States Department of Transportation. *See generally* 49 U.S.C. § 105.

[4] The Complaint does not address the years 1980--1987.

[5] The Firestone ATX brands included the ATX, ATX II, and Wilderness AT Tires. App. at 144, 150, 154. Unless otherwise specified, we refer to these brands collectively as the "ATX" tires.

sales volume and Firestone's financial health had improved markedly. Firestone had been losing approximately $1 million per day as of 1989-1990, prior to entering into the contract with Ford to outfit the Explorer with ATX tires; by 1993, Firestone was profitable.

Beginning in 1992, Firestone began receiving consumer complaints regarding tire tread defects, some of which led to "rollover" accidents in which the Explorer would flip over on to its side. Between 1992 and 1996, consumers filed 16 or more lawsuits against Bridgestone or Firestone for rollover accidents allegedly caused by ATX tire failures on the Explorer. Between 1993 and 1994, such suits based on problems with ATX tires increased from 13% of the claims filed against Firestone from problems in light truck tires to 43% of that category of claims. By 1999, at least 50 such suits had been filed.

The Complaint alleges that by 1994, under pressure to cut its costs and increase the productivity and production rates of its American manufacturing facilities, Firestone imposed longer hourly work shifts to permit around-the-clock, seven days-a-week operations. In July 1994, Firestone's labor force, which was unionized, responded by engaging in a massive production strike.

During the strike, Firestone continued production at its Decatur, Illinois manufacturing plant. To do so, Firestone staffed the manufacturing floor with "untrained and inexperienced non-union replacement workers," along with management employees. App. at 146. During the strike, the number of defective tires increased sharply "as supervisors and under-trained or untrained replacement workers were called on to master highly skilled jobs to keep the Decatur plant running." *Id.* at 147.

In 1996, Firestone management, as part of the negotiations that ended the strike, extracted from the Firestone employees' union concessions under which production speed increased, including longer work shifts and retention of a seven-days-a-week production schedule. *Id.* at 147. In its 1996 Annual Report, Bridgestone proclaimed that "[w]e reached an agreement in 1996 with the union that represents employees at several of our North American plants . . . The union has accepted already-implemented adjustments in working hours that permit our plants to operate 24 hours a day, seven days a week." *Id.* at 246. After the strike, the increased level of production errors persisted in tires made at Firestone's Decatur plant. The Complaint alleges that production and inspection shortcuts resulted in a sharp rise in the number of tires that were not properly manufactured, tested, or inspected.

In 1996, Firestone performed random quality control high-speed durability tests on various ATX tires. In one of the sample tests, Firestone examined 129 ATX tires made at the Decatur plant. Eighteen of those tires failed the test due to tire tread separation. In another random test of 229 ATX tires from the Decatur plant, 31 failed. In an additional random test of 18 ATX tires, eight failed, seven of which were from the Decatur plant. Internal Firestone documents show that the tires' tread separation rate was highest for tires produced at the Decatur plant from 1994 to 1996, during and just after the strike.

In addition to the alleged several thousand claims submitted by consumers directly to Firestone for compensation, between 1997 and 1999, United States consumers filed 34 suits against Bridgestone or Firestone based on deaths or injuries allegedly caused by rollovers of Explorers equipped with Firestone ATX tires. By no later

than 1997, senior Firestone officials, including Firestone CEO and Bridgestone Executive Vice-President Ono, were tracking the claims and lawsuits. Robert Martin, who was Firestone's Vice President of Quality Assurance from 1997 or earlier until his retirement in April 2000, testified in a deposition that senior Firestone executives, Ono included, met at least quarterly from 1997 through 1999. The meetings consisted of Firestone's senior management group, the financial group, the quality group, and the public relations/marketing department. Martin testified that those meetings included discussion of tread-peeling claims and lawsuits lodged against Firestone and Bridgestone.

Internal Firestone documents regarding property damage, injury claims, and tire performance data, such as warranty adjustments and financial analysis of such claims, show that starting in 1996, the ATX tires began to fail at higher rates than they had before. Similarly, a Firestone chart reveals that from 1998 to 1999, tread separations for the Wilderness AT, one of Firestone's ATX tire models, increased by 194%. According to a 1999 internal Firestone report, in 1997 and 1998, another Firestone tire model, the ATX II, accounted for the majority of the tire claims against Firestone but for less than 10% of Firestone's total tire production. The Complaint alleges that Firestone "had knowledge of thousands of claims for and complaints concerning ATX tire failures, especially ATX tires manufactured at [its] Decatur, Illinois plant during and after a bitter 1994-1996 strike, due to design and manufacturing defects which resulted in over 2,200 rollover accidents, over 700 serious injuries and approximately 174 fatalities by 2000." App. at 131 (Complaint). In response to the lawsuits, Firestone and Bridgestone entered into settlement agreements under which the settlement agreements with plaintiffs were sealed, the parties entered into stipulated protective orders to conceal discovery, and Bridgestone or

Firestone had returned to it "damaging documents." *Id.* at 151.

In 1996 and 1997, State Farm Insurance Company, the largest automobile insurer in the United States, demanded that Firestone pay the costs of automobile accidents attributable to ATX tire failures. Without conceding (or contesting) liability, Firestone reimbursed State Farm without public disclosure of the claims or the resulting payments. Having been paid, State Farm did not sue Firestone, lawsuits which the Complaint alleges "would have publicized the growing problem with the ATX tires." *Id.* at 150.

Firestone suppressed information pertaining to investigations by various governments, domestic and foreign. In 1996, Arizona state government agencies expressed concern about the Firestone ATX tires. Firestone sent a team of engineers to investigate and then replaced certain Explorer tires without any public disclosure of the investigation or the replacements.

In Venezuela, between 1990 and 1998, over forty people were killed in Explorer accidents allegedly due to ATX tire failures. Ford demanded that Firestone alter the design of its ATX tire being sold in Venezuela to include a nylon layer. Firestone initially did not do so. The Venezuelan government investigated and expressed concerns to Firestone about the ATX tires. According to a Venezuelan government document, Firestone agreed to add a nylon layer to the tires in exchange for the Venezuelan government's promise that it would not publicly disclose this act by Firestone. According to the Venezuelan government document, Firestone expressed a belief that disclosure of the layer-adding "would put in jeopardy the Bridgestone brand in Venezuela." *Id.* at 152.

In Saudi Arabia, multiple people in Ford Explorers outfitted with Firestone ATX tires also died between 1990 and 1998 due, allegedly, to ATX tire failures. *Id.* at 152. Firestone's senior management team discussed the possibility of a formal recall of the ATX tires in the Persian Gulf region. Firestone ultimately decided not to initiate such a recall. *Id.* A March 1999 internal Ford memorandum stated, with respect to that decision, that "Firestone legal has some major reservations about the plan to notify customers and offer them an option . . . They feel that [the National Highway Traffic Safety Administration, or 'NHTSA'] will have to be notified of the program, since the product is sold in the U.S." *Id.* at 153.

Regarding the ATX-related accident data from the United States, Venezuela, and Saudi Arabia, the Complaint alleges that Bridgestone and Firestone executives "kept the accident rate data which they had and which showed these serious problems from safety regulators." *Id.* at 151. The Complaint alleges that their motive for doing so was "so they could report huge profits and their executives could retain their positions of power, prestige and profit and Bridgestone's stock and ADRs would continue to trade at inflated, higher prices, providing the executives with direct economic benefits based on their stock holdings and options and allowing them to personally pocket huge bonuses based on corporate profits." *Id.* at 151-52.

The Complaint alleges a series of public, fraudulent statements by Bridgestone and Firestone, beginning in March 1997 when Bridgestone issued its 1996 Annual Report.[6]

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[6] The Complaint relies heavily on Bridgestone's Annual Reports for fiscal years 1996--2000. Bridgestone attached to its motions to dismiss before the district court copies of those

(Bridgestone typically issued its annual reports for each fiscal year in March or April of the subsequent year). The 1996 Annual Report stated, in its introductory "Word from the President" section:

> We are staking our claim to global leadership on the tire industry. . . . I am especially satisfied with our ongoing business turnaround in the Americas, the biggest tire market in the world
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> * * * * * *
>
> Our competitive edge in tire technology remains our highest asset. . . . Technology will continue to strengthen the appeal of our products and operations. This will include safety and improving performance.

App. at 245-47 (1996 Annual Report).

In March 1998 came Bridgestone's 1997 Annual Report. The accompanying letter stated: "We are making steady progress towards leadership in the world tire industry . . . . Sales at our subsidiary for the Americas, [Firestone], surpassed our parent-company turnover for the first time." App. at 289 (1997 Annual Report). Similarly, Bridgestone's 1998 Annual Report, issued in April 1999, stated: "[t]he Americas, the largest tire market in the world, are our biggest

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documents. *See* App. at 241--476. Accordingly, we, like the district court, consider the full text of the 1996--2000 Annual Reports. *See Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) ("[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim." (internal quotations omitted)).

source of consolidated sales . . . Our global market share in original equipment tires increased further in 1998. That growth evidences high regard among automakers for our strengths in product quality." App. at 342 (1998 Annual Report).

In early February 2000, a Houston, Texas television station reported that passengers in three Explorers equipped with ATX tires had died after suffering rollover accidents. On February 4, 2000, Firestone issued a release stating: "We monitor the performance of all of our tires and . . . we have full confidence in them." App. at 167 (Complaint).

In March 2000, Bridgestone issued its 1999 Annual Report. It stated: "We are determined to assert a singular advantage in product technology. . . . We increased our market share in North America in 1999 in . . . the original equipment market. Our North American operations are approaching a market share of 20%." App. at 384 (1999 Annual Report). The Report included in its "Analysis of Financial Position" section a chart indicating that as a percentage of Bridgestone's total international net sales, its net sales in the Americas were 41.5 %,[7] followed by Japan at 40.8%, Europe 10.6% and "Others" 7.1%. *See id.* at 403. In the "Americas" section, under the bold, purple-colored, large font heading of "Trends And Topics," the Report stated that "[w]e increased our market share in North America in 1999 . . . Demand for original equipment tires continued to grow in 1999 in the booming North American automobile market." *Id.* at 383-84. The Annual Report also stated that "[o]ur

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[7] Bridgestone's 1999 Annual Report did not break down the sales data between North and South America, nor as between dealers in individual countries in the Americas.

multi-brand strategy--centered on the Bridgestone, Firestone, and Dayton[8] brands--raised our market profile further in 1999," and that "aggressive product development and strategic marketing have re-established the Firestone name as a vigorous brand in premium-grade tires, as well as a large-volume, middle-market tires." *Id.* at 384. It continued: "Ford Motor Company is our oldest customer in North America . . . We also have become a major supplier to General Motors Corporation, which recently honored us with its Supplier of the Year Award for the fifth consecutive year. As a major supplier to leading European automakers, we have developed business with the North American operations of those automakers, too. We also supply tires to nearly all the Japanese-owned vehicle plants in North America." *Id.*

Each of the Annual Reports covering fiscal years 1996 to 1999 included financial statements with a category labeled "Contingent Liabilities." *See* App. at 278, 322, 367, 417-18 (1996–1999 Annual Reports, respectively). None of those reports, though, made a mention or disclosure of any loss contingency related to any of Bridgestone or Firestone's tire products that had previously been sold or sent to dealers.

Each of the Annual Reports from 1996 to 1998 included a letter from Bridgestone's outside auditors Asahi and Company stating that the given Annual Report was prepared "in conformity with accounting principles generally accepted in Japan applied on a consistent basis." App. at 280, 324,370 (1996--1998 Annual Reports, respectively). The 1999 Annual Report contained similar language, stating that the

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[8] Dayton was a Bridgestone brand marketed, in the words of the 1999 Annual Report, to consumers seeking "value-oriented tires." App. at 384.

consolidated financial statements accompanying it were prepared "inconformity with accounting principles and practices generally accepted in Japan . . . applied on a consistent basis, except for changes, with which we concur, in the method of accounting for retirement and severance benefits and pension costs . . . and for goodwill, consolidation differences, and income taxes." App. at 422 (1999 Annual Report). The Complaint alleges that under International Accounting Standard § 9010.08-.09, applicable in Japan pursuant to the International Accounting Standards Committee, "loss contingencies should be recorded if it is probable that an asset has been impaired or a liability incurred at the balance sheet date and a reasonable estimate of the amount of the resulting loss can be made." App. at 178 (Complaint). Section 9010.08-09 provides further that "if either of the conditions is met and the possibility of the loss is not remote, the existence of the contingent loss should be disclosed in the financial statements." *Id.* The Complaint alleges that under this standard, Bridgestone's lack of recordings of a loss contingency in the financial statements accompanying the Annual Reports for fiscal years 1996 through 1999 related to the safety and legal problems with the Firestone ATX tires–in particular a recall--were each separately an actionable misrepresentation in violation of federal securities laws.

Generally Accepted Accounting Principles, or "GAAP," are a series of general principles followed by accountants in a given country or geographic area. Bridgestone's 1999 Annual Report stated that "[t]he Japanese consolidated financial statements have been prepared in accordance with the provisions set forth in the . . . accounting principles and practices generally accepted in Japan ('Japanese GAAP')." App. at 413 (1999 Annual Report). It represented that the "accompanying financial statements include the accounts of

certain foreign subsidiaries, which are based upon U.S. GAAP, representing 45% of total consolidated assets and 51% of total consolidated revenues in 1999." *Id.* Bridgestone and Firestone do not dispute that this statement was a reference to, among other non-Japanese Bridgestone subsidiaries, Firestone. United States GAAP, as set forth in Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 5 ("FASB 5"), "requires that loss be accrued whenever it is probable a loss has been incurred or an asset impaired and the amount of the loss can be reasonably estimated" and that "[i]f the loss is at least reasonably possible but no reasonable estimate can be made, the contingency at a minimum should be disclosed." App. at 178 (Complaint). The 1999 Annual Report stated that Japanese GAAP "are different in certain material respects (*e.g.* topics addressed, available alternatives, recognition criteria, measurement practices, presentation formats and disclosures, etc.), as compared to accounting and reporting standards generally accepted in the U.S. ('U.S. GAAP')." App. at 413(1999 Annual Report). At note 11, the Report included "a supplemental discussion of the accounting differences," *id.*, and listed a number of "differences between Japanese and U.S. GAAP,"*id.* at 421. Note 11 did not include a reference to FASB 5 as one of the differences between U.S. and Japanese GAAP. *See id.* The Complaint alleges that under FASB 5, Bridgestone's failure to either accrue for a loss or disclose both the ongoing losses from claims due to settlement and the contingency of a recall or a major loss related to the impairment of the Firestone tires was an actionable misrepresentation.

In July 2000, after consumers filed two lawsuits against Firestone alleging that ATX tire tread separation caused Ford Explorers to roll over and cause fatalities, the Wall Street Journal asked Firestone to comment. A resulting July 26,

2000 Wall Street Journal article quoted a Firestone representative as stating that Firestone had "full confidence" in its tires. App. at 170-71 (Complaint). Also in July 2000, several safety groups urged Ford to recall all Explorers with Firestone ATX tires on them. On August 1, 2000, Firestone issued a written statement that "[w]e continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires." *Id.* In that release, Firestone further stated that "[p]roperly inflated and maintained Firestone ATX . . . tires are among the safest tires on the road today." *Id.* On August 3, 2000, the New York Times published an article about the Explorer and Firestone's ATX tires, suggesting problems with the tires. The article reported that "Firestone denied the charges. . . . 'These are safe tires,' said . . . a [Firestone] spokeswoman." *Id.* at 171.[9] The Complaint alleges that these public statements by Firestone in July 2000 and August 2000 were misrepresentations in violation of federal securities laws.

On August 9, 2000, Firestone announced that effective that day, it was beginning a formal, voluntary safety recall. The recall included 6.5 million Firestone ATX tires on Explorers already sold and an offer to replace all Firestone ATX tires on unsold Explorers in dealers' inventory at that time. The recall specifically designated ATX tires made at Firestone's Decatur plant.

In the months immediately following the recall, Firestone and Bridgestone suffered major upheaval. In October 2000,

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[9] The New York Times article identified the name of the Firestone spokesperson. Because that person is not a defendant in this case, and because neither the quotation's accuracy nor the spokesperson's job description are disputed, we need not repeat it here.

Ono resigned as Executive Vice President of Bridgestone and Chief Executive of Firestone. In January 2001, Kaizaki resigned as Bridgestone's President and Chief Executive Officer. Saudi Arabia banned the importation of ATX tires. The two companies' images were subjected to an array of public condemnation by regulators,[10] congressional representatives from both major American political parties,[11]

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[10] *See, e.g.*, Jennifer Hoyt, *Agency Seeks Broader Authority to Probe Vehicle Safety Breaches*, Houston Chronicle, Sept. 13, 2000, at 4, *available at* 2000 WL 24511175 ("NHTSA Administrator Sue Bailey said she thought the problem was with tires, but that the agency was still investigating the vehicle-tire interaction."); Nedra Pickler, *Hearings Scheduled on Tire Case*, Associated Press, Sept. 14, 2000, available at 2000 WL 26675534 ("The National Highway Traffic Safety Administration has said it is investigating 88 deaths and more than 250 injuries over the past decade involving Firestone tires. The Wall Street Journal reported Thursday that five more deaths have occurred since the recall of 6.5 million ATX, ATX-II and Wilderness AT tires was announced"); App. at 136 (quoting a statement made August 30, 2000 by Samuel Ruh Rios, President of Indecu, the Venezuelan safety agency, that Bridgestone and Ford had "met to plan ways out of a situation that was affecting their commercial interests, at the price of causing damage, destruction, and death. . . . Both companies hid information and this caused many accidents"); *id.* at 172 (quoting an August 31, 2000 Reuters Report as stating that "Venezuela's consumer protection agency recommended . . . that criminal charges be filed against Bridgestone Corp . . . over defects linked to at least 46 deaths in Venezuelan road accidents"). We take judicial notice of the fact that the media articles cited above were published, without reaching any conclusions about their truth. *See generally* Fed. R. Evid. 201.

[11] *See, e.g.*, Hoyt, *Agency Seeks Broader Authority*, 2000 WL 24511175 ("Sens. Dianne Feinstein . . . and Herb Kohl [] announced that they would introduce a bill to increase civil penalties for withholding information from NHTSA. Their bill also

and industry analysts.[12]

Most significant was the apparent financial impact of the recall. Firestone experienced a net $510 million loss for the 2000 fiscal year and Bridgestone' total profits decreased from about $764 million in 1999 to about $153 million in 2000. Between August 8, the day before the recall, and September 21, 2000, Bridgestone's common stock share price on the Tokyo stock exchange dropped from over $2,200.00 to less than $1,400.00. Between those same dates, its ADR share price dropped from over $202.00 to less than $122.00. Bridgestone's earnings for fiscal year 2000 were its lowest in a decade. In the 2000 Annual Report, then-newly installed

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would set criminal penalties for companies that knowingly allow defective vehicles or parts to be distributed if death or injury results."); App. at 172-73 (Complaint, quoting statement by United States Representative Heather Wilson, in response to claims by senior Firestone executives of lack of knowledge of fatal defects of the ATX tires: '"That's rubbish . . . You knew a long time ago.'"); *id.* at 173 (quoting Representative Billy Tauzin as stating through his spokesman, after a congressional hearing on the rollover accidents: '"This latest information only confirms our suspicion that [Bridgestone and Firestone] knew a hell of a lot more than they're willing to admit.'").

[12] *See, e.g.*, App. at 9 (Complaint) (quoting David Meyers, Associate Professor of Management at Akron University, as stating '"I'm on record as saying that the Firestone brand name is toast. . . . That company's in trouble, and that's not news. I attended the congressional hearings at which company executives testified, and those people aren't believable. I wouldn't trust them with my kids['] piggy bank'") (internal parentheses omitted); *id.* (quoting Columbia University Law School Dean and Professor David Leebron as stating, on January 21, 2001: '"This is Firestone's Pinto.'").

Bridgestone CEO Shigeo Watanabe stated that "[n]et earnings declined 80% in the past year . . . That decline is attributable mainly to a special charge in connection with the tire recall in the United States. We have recorded a charge at [Firestone] of $754 million [] for costs already incurred in replacing the recalled tires and for potential liabilities and other legal costs in connection with the problems that led to the tire recall. . . . Fallout from the recall will remain a marketing issue for us in North America and elsewhere in 2001." *Id.* at 432 (2000 Annual Report).[13]

In the wake of the recall, Firestone immediately launched a four-month internal investigation culminating in a report released publicly in December 2000. *See* App. at 174 (Complaint). The report found that two problems were central to the ATX tires' repeated failures. First was a problem with the tires '"shoulder pocket," an area from the sidewall to the tread designed to give traction in snow and off-road driving conditions. In many of the ATX tires, the shoulder pocket was made with an angle steeper than is proper such that the pocket cracked on the inside. Particularly in those tires produced at the Decatur plant, the cracking was prone to spread from the pocket to the point where two belts of rubber-coated steel fibers form the tires' core. *Id.* Second, noted the

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[13] The recall's public policy impact has been evident as well. The public controversy surrounding the safety issues that led to the recall has in important ways influenced the policy debate in the four years since the recall. *See, e.g.*, Danny Hakim, *U.S. Regulators Release Vehicle Rollover Data*, N.Y. Times, Aug. 10, 2004, at C1, available at 2004 WLNR 5561590 ("The government rollover tests began this year at the direction of Congress, which ordered the agency to develop a track test in the wake of a series of fatal rollover crashes in the late 1990's involving Ford Explorers equipped with Firestone tires.").

report, the materials used at the Decatur plant produced tires less likely to stay intact. To make a tire, the various layers are heated and squeezed together by fusion. The Decatur plant produced rubber pellets while the other plants used rubber sheets. In each case, the pellets or sheets were sprayed with lubricant to keep the rubber from sticking together in large globules. Lubricant makes tires stick together less. Because the pellets had a larger surface area than the sheets, the pellets in the Decatur plant were exposed to two or three times more lubricant than the sheets from other plants. After Firestone's internal report was issued, Firestone began shipping rubber sheets from other plants to the Decatur plant to avoid this problem. *Id.*

On May 11, 2001, the Retirement Fund (as lead named plaintiff for the Class) filed the instant Consolidated Class Action Complaint in the United States District Court for the Middle District of Tennessee alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78j(b), and Securities Exchange Commission Rule 10b-5, codified at 17 C.F.R. § 240.[14] *See* App. at 130-186. The four defendants--Bridgestone, Firestone, Kaizaki, and Ono--moved to dismiss the Complaint on a variety of grounds. *See* App. at 191-526.

On September 30, 2002, the district court issued a lengthy memorandum opinion and accompanying order dismissing the

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[14] On January 4, 2001, the Retirement Fund filed a class action against the now defendant-appellees in the United States District Court for the Middle District of Tennessee, alleging securities fraud. On January 22, 2001, plaintiff Patricia Ziemer filed a similar Complaint in that same court against the same defendants. On April 11, 2001, the district court consolidated the two actions into the instant case.

Complaint. *See* App. at 975-1038. Two of the district court's rulings are relevant in this appeal, each of which we describe in further detail within our analysis in Part II. First, the district court granted Kaizaki's motion to dismiss for lack of jurisdiction. Second, the district court granted--as to the remaining three defendants, Bridgestone, Firestone, and Ono--their motions to dismiss with prejudice all counts for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

The Retirement Fund appeals.

II. DISCUSSION

On appeal, our analysis proceeds in three parts. Part II(A) articulates the applicable standards of review. Part II(B) assesses whether the district court erred in granting Kaizaki's motion to dismiss for lack of personal jurisdiction and concludes that it did not. Part II(C) addresses the merits and divides into two sections. Part II(C)(1) discusses whether the Complaint adequately pleaded any actionable statements and concludes, contrary to the district court, that one statement by Firestone and two statements by Bridgestone were actionable but, like the district court, that the remaining alleged statements in the Complaint were not actionable. Part II(C)(2) analyzes whether, for those three actionable statements, the Complaint adequately pled scienter as against Bridgestone, Firestone and Ono. It concludes that the Complaint did so for at least one statement with respect to each of the two corporate defendants, but did not do so with respect to Ono.

A. Standards of Review

We review de novo the district court's dismissal of the counts against Kaizaki for lack of personal jurisdiction. *See Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790,

793 (6th Cir. 1996). We also review de novo the district court's dismissal of the securities fraud complaint against Bridgestone, Firestone, and Ono for failure to state a claim upon which relief can be granted. *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 680, 91 Fed. Appx. 418 (6th Cir. 2004). In performing that review, we, like the district court, "must accept as true 'well-pleaded facts' set forth in the complaint." *Id.* (quoting *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)). The Retirement Fund "need only give a 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Rule 12(b)(6) allows a dismissal for failure to state a claim only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Id.* "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." *Lawler*, 898 F.2d at 1199 (quoting *Neitzke v. Williams*, 490 U.S. 319, 328, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)). Construing the Complaint in a light most favorable to the Retirement Fund, we must determine whether it "undoubtedly can prove no set of facts in support of [its] claims that would entitle [it] to relief." *PR Diamonds*, 364 F.3d at 680. That said, we do not accept as true "the bare assertion of legal conclusions," *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) (internal quotation omitted), nor do we "accept as true legal conclusions or unwarranted factual inferences," *id.* (quoting *Morgan*, 829 F.2d at 12). Further, we may affirm the district court on any ground supported by the record. *Hoffman v. Comshare, Inc. (In re Comshare Inc. Sec. Litig.)*, 183 F.3d 542, 547-48 (6th Cir. 1999).

B. Personal Jurisdiction

The Due Process Clause of the United States Constitution "permits the exercise of both general and specific jurisdiction." *Aristech Chem. Int'l Ltd. v. Acrylic Fabricators, Ltd.*, 138 F.3d 624, 627 (6th Cir. 1998). "General jurisdiction exists when a defendant has continuous and systematic contacts with the forum state sufficient to justify the state's exercise of judicial power with respect to any and all claims." *Id.* (internal quotation omitted). Kaizaki lives today in Japan and at all relevant times lived and worked in Japan. The Retirement Fund does not argue that the district court could assert general jurisdiction over him. Rather, it argues that the district court should have exercised specific jurisdiction over him, which, in contrast, "subjects the defendant to 'suit in the forum state only on claims that arise out of or relate to a defendant's contacts with the forum.'" *Id.* at 627-28 (quoting *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868 & n. 8, 80 L. Ed. 2d 404 (1984) (internal quotations in original omitted)).

Whether specific jurisdiction exists over Kaizaki depends on three criteria. *Id.* at 628. First, he must have purposefully availed himself of the privilege of acting in the United States or have purposefully caused a consequence in the United States. *Id.* Second, the cause of action must arise from his actions in the United States. *Id.* Finally, the exercise of jurisdiction by a court within the United States[15] over Kaizaki

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[15] The Securities Exchange Act includes a nationwide service-of-process provision. *See* 15 U.S.C. § 78aa. Therefore, the "forum" for the purposes of personal jurisdiction analysis in the Kazaiki's context is the United States, rather than any particular federal judicial district within the United States. *See United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993)

must be reasonable under the circumstances of this case. *Id.* The district court held that the Retirement Fund's Complaint failed all three prongs. *See* App. at 997-1002. We must affirm the district court's holding if we conclude that any one of the three prongs are not satisfied. *See, e.g., LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1303 (6th Cir. 1989) ("[E]ach criterion represents an independent requirement, and failure to meet *any* of the three means that personal jurisdiction *may not* be invoked.") (emphasis added).

Upon review, we conclude, under the circumstances of this case, that the third, "reasonableness" prong tips against exercising jurisdiction against Kaizaki. Whether the exercise of jurisdiction over a foreign defendant is reasonable is a function of balancing three factors: "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Indus. v. Superior Ct. of Cal.*, 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

Applying that balancing test to this case, there is clearly potential, should this suit go forward, for some substantial burden on Kaizaki. The Supreme Court has cautioned that "*[g]reat care and reserve* should be exercised when extending our notions of personal jurisdiction into the international field,'" *id.* at 115 (internal quotations omitted) (emphasis added), and that "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders,"

(holding that 15 U.S.C. § 78aa "confers personal jurisdiction in any federal district court over any defendant with minimum contacts to the United States").

id. at 114. In performing this balancing of interests, we keep an eye towards "the interstate judicial system's interest" in judicial economy and "the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 113. In *Aristech*, decided in 1998, this Court upheld the reasonableness of exercising jurisdiction over a Canadian executive by reasoning, in part, that "a Canadian defendant . . . bears a substantially lighter burden than does a *Japanese* defendant – or for that matter, most other foreign defendants," since "only a short plane flight separates Ontario from Kentucky." 138 F.3d at 628 (emphasis added). "This is not a case," the court in *Aristech*, "where the exercise of jurisdiction requires a company to travel from the other side of the world or even across the Atlantic [ocean]." *Id.* (internal citations omitted). In contrast, of course, Kaizaki is living in Japan, and is a retired senior citizen at that. Though, presumably, a deposition or other proceedings involving Kaizaki's participation could be conducted by telephone or by counsel in Japan, circumstances might necessitate his traveling to the United States for a trial or other litigation-related purpose.

Turning to the other side of the scale, the countervailing interests of the United States as the forum and the class plaintiffs in the instant suit being prosecuted against Kaizaki are relatively light. The key defendants, we think, are Bridgestone and Firestone, the two corporate entities with substantial ongoing business affairs in the United States. The court's personal jurisdiction over the corporate defendants, and indeed over defendant Ono, is conceded.[16] Thus, the

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[16] Bridgestone did not cross-appeal the denial of its motion to dismiss for lack of personal jurisdiction. Neither Ono or Firestone have contested personal jurisdiction.

marginal addition of Kaizaki would add little or nothing to the potential recovery should the plaintiffs ultimately prevail on the merits and be awarded damages, for which Kaizaki would be at most "liable jointly and severally," but not separately liable. 15 U.S.C. § 78t(a). We thus agree with the district court's conclusion that "[b]ecause Bridgestone, Firestone and Ono are subject to jurisdiction, no actual violation of securities laws would go unpunished, and any [recovery] is highly unlikely to be affected by Kaizaki's dismissal." App. at 1001. Though the United States and the class plaintiffs of course have an interest in the enforcement of federal securities laws, those interests as against Kaizaki are tempered in the circumstances of this case. We find no error in the district court's conclusion that exercise of jurisdiction over Kaizaki in the circumstances of this case was not reasonable. Thus, even assuming, without deciding, that the first two prongs of the three-part specific jurisdiction test are satisfied, the district court did not err in granting Kaizaki's motion to dismiss for want of personal jurisdiction on the grounds that the third "reasonableness" prong was not satisfied.

The Retirement Fund suggests that even if we conclude that the circumstances of this case do not satisfy the test for personal jurisdiction over foreign defendants, its "allegations of control person liability" nonetheless "provide personal jurisdiction over Kaizaki." Appellant's Br. at 53. The notion of a control person derives from § 20(a) of the Securities Exchange Act, which attaches liability to "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t(a). The term "control" in this context is defined by the code of federal regulations as "the possession, direct or

indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405.

There is a division of judicial authority as to whether showing that a defendant is a controlling person within the meaning of these provisions (and thereby potentially liable under the securities law to the same extent as the controlled entity) is automatically sufficient to bring that defendant within the personal jurisdiction of the court merely because the controlled entity itself has the requisite jurisdictional contacts. *See, e.g., In re Baan Co. Sec. Litig.*, 245 F. Supp. 2d 117, 128-29 (D.D.C. 2003) (collecting cases). This court has not apparently addressed the issue.

The Retirement Fund's theory is supported most prominently by *San Mateo County Transit Dist. v. Dearman, Fitzgerald, & Roberts, Inc.*, 979 F.2d 1356 (9th Cir. 1992). That decision held that jurisdiction is appropriate if the plaintiff makes only "a non-frivolous allegation that the defendant controlled a person liable for the fraud." *Id.* at 1358; *see also McNamara v. Bre-X Minerals Ltd.*, 46 F. Supp. 2d 628, 636-37 (E. D. Tex. 1999) (adopting a rule that "the Court has personal jurisdiction over any Defendant as to which the Plaintiffs make a *prima facie* showing of control person liability."). Kaizaki responds that "[a] claim of statutory liability . . . is no substitute for establishing personal jurisdiction." Appellees Bridgestone and Kaizaki's Br. at 46 n.18 & accompanying text. We agree. "[L]iability is not to be conflated with amenability to suit in a particular forum. Personal jurisdiction has constitutional dimensions, and regardless of policy goals, Congress cannot override the due process clause, the source of protection for non-resident defendants." *AT&T Co. v. Compagnie Bruxelles Lambert*, 94

F.3d 586, 590-591 (9th Cir. 1996) (internal citations omitted). The broad understanding of control person liability adopted by the securities laws cannot on its own support personal jurisdiction. This approach would, as one persuasive opinion stated, "impermissibly conflate[] statutory liability with the Constitution's command that the exercise of personal jurisdiction must be fundamentally fair." *In re Baan*, 245 F. Supp. 2d at 129 (Huvelle, J.). Though they may involve a similar contact-based analysis, ultimately, the two inquiries must be distinct: "control person liability under the securities laws is not germane to the issue of personal jurisdiction . . . ." *FDIC v. Milken*, 781 F. Supp. 226, 234 (S.D.N.Y. 1991) (Pollak, J.).

We thus reject the Retirement Fund's invitation to substitute our analysis of the securities laws' substantive bases for liability for the required, due-process based personal jurisdiction analysis, and therefore decline to address Kaizaki's potential liability as a control person. For the foregoing reasons, we hold that the district court did not err in granting Kaizaki's motion to dismiss for want of personal jurisdiction. We turn then to the merits of the Complaint and analyze whether the district court erred in granting the motion to dismiss as against the other three defendants on the grounds that it failed to state a claim upon which relief could be granted.

C. Merits

Since their enactment in response to the stock market crash of 1929, the "basic policies underlying securities regulation" have been that "'there cannot be honest markets without honest publicity'" because "'[m]anipulation and dishonest practices of the market place thrive upon mystery and secrecy.'" *Helwig*, 251 F.3d at 556 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 230, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988) (quoting H.R. Rep. No. 1383, at 11 (1934))). The Supreme Court "'repeatedly has described the fundamental purpose of the Act as implementing a philosophy of full disclosure,'" *Helwig*, 251 F.3d at 556 (quoting *Basic*, 485 U.S. at 230)), "to substitute a philosophy of full disclosure for the philosophy of caveat emptor," *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963)). Generally, federal securities law prohibits "fraudulent, material misstatements or omissions in connection with the sale or purchase of a security." *Morse v. McWhorter*, 290 F.3d 795, 798 (6th Cir. 2002). Specifically, in order to state a claim under Section 10(b) of the Securities Exchange Act of 1934, or under SEC Rule 10b-5, a plaintiff must allege: (1) a misrepresentation or omission; (2) of a material fact that the defendant had a duty to disclose; (3) made with scienter; (4) justifiably relied on by plaintiffs; and (5) proximately causing them injury. *Helwig v. Vencor, Inc.*, 251 F.3d 540, 554 (6th Cir. 2001) (en banc) (citing *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1409 (6th Cir. 1991)); *see also Sofamor Danek*, 123 F.3d at 400.[17]

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[17] The Complaint also alleges liability against Kaizaki and Ono under § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), which provides for liability of controlling persons. As

A statement is said to be "actionable" when it satisfies the first two of these requirements, i.e., it is a misrepresentation or omission of a material fact that the defendant had a duty to disclose. *See, e.g., Nathenson v. Zonagen Inc.*, 267 F.3d 400, 415 (5th Cir. 2001); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 179 (2d Cir. 2001).

The district court held that the Retirement Fund's Complaint failed to plead adequately any actionable statements for any allegedly fraudulent statements. It held, in the alternative, that the Retirement Fund failed to plead scienter adequately. The district court did not address the remaining two elements of the claim: reliance and proximate cause. As detailed in the discussion that follows, the district court's merits holdings were in part erroneous.

1. Actionable Statements

In order to be actionable, a misrepresentation or omission must pertain to material information that the defendant had a duty to disclose, two significant limitations to the general policy of disclosure. *See, e.g., Basic*, 485 U.S. at 238 ("[I]n order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were misleading as to a material fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.") (emphasis in original omitted); *In Re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) ("[T]here is no general

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discussed above, we need not analyze the merits of the § 20(a) claim against Kaizaki because we resolve those claims on the jurisdictional issue. And, as discussed below, we need not resolve the "merits" of the control person liability theory against Ono beyond our conclusion that the Complaint does not adequately plead scienter against him.

duty on the part of a company to provide the public with all material information."). As this Court has recognized, this set of requirements preserves the healthy limits on a public corporation's "duty to disclose all information[,] even colorably material," because corporations might otherwise "face potential second-guessing in a subsequent disclosure suit," a regime that would threaten to "deluge investors with marginally useful information, and would damage corporations' legitimate needs to keep some information non-public." *Sofamor Danek*, 123 F.3d at 403 (internal quotations and citations omitted). A duty to affirmatively disclose "may arise when there is insider trading, a statute requiring disclosure," or, as relevant to this case, "an inaccurate, incomplete or misleading prior disclosure." *In re Digital Island Sec. Litig.*, 357 F.3d 322, 329 n.10 (3d Cir. 2004) (internal quotations omitted).

As for materiality, whether or not a statement is material turns on "a fact-intensive test." *Helwig*, 251 F.3d at 555.[18] "'Materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information.'" *Id.* (quoting *Basic*, 485 U.S. at 240). That is, would the information, had it been presented accurately, have "'significantly altered the 'total mix' of information made available?'" *Id.* at 563 (quoting *Basic*, 485 U.S. at 231-32).

In this vein, this Court has distinguished between "hard" and "soft" information." *Sofamor Danek*, 123 F.3d at 401-02.

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[18] *Cf.* R. Gregory Roussel, *Securities Fraud or Mere Puffery: Refinement of the Corporate Puffery Defense*, 51 Vand. L. Rev. 1049, 1064-66 (1998) (discussing the virtues of the "contextual standard," as distinguished from rigid, bright-line rules, in assessing whether a statement should be classified as puffery).

"Hard information is typically historical information or other factual information that is objectively verifiable." *Id.* at 401 (internal quotations omitted). Publicly disclosed, hard information is actionable if false and material.

"Soft information," on the other hand, includes "predictions and matter of opinions." *Id.* at 402. The failure to disclose soft information is actionable "'only if [it is] . . . virtually as certain as hard facts.'" *Starkman v. Marathon Oil Co.*, 772 F.2d 231, 241 (6th Cir. 1985)). Thus, federal courts "everywhere 'have demonstrated a willingness to find immaterial as a matter of law certain kinds of rosy affirmation heard from corporate managers and numbingly familiar to the marketplace--loosely optimistic statements that are so vague, [and] so lacking in specificity, . . . that no reasonable investor could find them important to the total mix of information available.'" *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570-71 (6th Cir. 2004) (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996)).

However, opinions may be deemed false or misleading under the securities laws if proof of their falsity can be established "through the orthodox evidentiary process." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090, 1091-93, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991). For such statements, '"a company is generally under no obligation to disclose its expectations for the future to the investing public.'"*Helwig*, 251 F.3d at 564 (quoting, with approval, *Kowal v. MCI Communications Corp.*, 305 U.S. App. D.C. 60, 16 F.3d 1271, 1277 (D. C. Cir. 1994)). If a company "chooses to volunteer such information," though, "its disclosure must be full and fair, and courts may conclude that the company was obliged to disclose additional material facts . . . to the extent that the volunteered disclosure was misleading . . . ." *Id.* (internal quotations omitted). Our

securities laws therefore "require an actor to 'provide complete and non-misleading information with respect to the subjects on which he undertakes to speak.'" *Helwig*, 251 F.3d at 561 (quoting *Rubin v. Schottenstein*, 143 F.3d 263, 268 (6th Cir. 1998) (en banc)).

> The question thus is not whether a [defendant's] silence can give rise to liability, but whether liability may flow from his decision to speak . . . concerning material details . . ., without revealing certain additional known facts necessary to make his statements not misleading. This question is answered by the text of [SEC] Rule 10b-5(b) itself: it is unlawful for any person to "omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ."

Rubin, 143 F.3d at 267 (quoting 17 C.F.R. § 240.10b-5(b)).

With these standards in mind, we consider whether the plaintiffs have alleged any actionable statements. The alleged statements fall into two categories: (1) public statements by Bridgestone and Firestone affirming the safety or quality of Firestone's tires; and (2) allegedly false representations made by Bridgestone in the financial statements accompanying its Annual Reports.

a. Statements about the Quality or Safety of Firestone's ATX Tires

The Retirement Fund argues that a number of public statements by Bridgestone and Firestone about the quality or safety of Firestone's ATX times (summarized in Part I) are actionable because they were made "while in possession of

specific, adverse information undermining the truth of those statements," Appellant's Br. at 40, thereby engendering a duty to disclose known adverse information about the safety of Firestone's tires. These statements include: (1) Bridgestone's 1996 Annual Report statement that it sold "the best tires in the world," its publicly distributed written statement in "late 1996" that it had "no reason to believe there is anything wrong with [its ATX tires]"; (2) Bridgestone's 1997 Annual Report statement that its products demonstrated "global consistent quality"; (3) Bridgestone's 1997 Annual Report statement that "[r]igorous testing under diverse conditions at our proving grounds around the world helps ensure reliable quality for original equipment customers"; (4) Bridgestone's 1998 Annual Report statement that sales success in North American was due to "high regard among automakers for our strengths in product quality;" (5) Bridgestone's 1999 Annual Report statement that "[w]e have built a premium-quality for . . . Firestone tires" and that "aggressive product development" had "re-established the Firestone name as a vigorous brand in premium-grade tires;" (6) Firestone's statements in February 2000 that it had "full confidence" in the ATX tires and that "our experience with Radial ATX indicates high consumer satisfaction with the quality and reliability of these tires"; (7) Firestone's statement in July 2000 that it had "full confidence" in its tires; and (8) Firestone's statement on August 1, 2000 that "[w]e continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires" and that "[t]hese are safe tires."

As to Bridgestone's statements, the district court concluded that they were "statements of self-praise and confidence in its future," which "constituted immaterial opinions." App. at 1019. Similarly, as to Firestone's

statements, the district court held that they were "of general optimism and in defense of its products . . . [and] immaterial as a matter of law." *Id.* at 1029. Accordingly, the district court held that all of these statements were non-actionable.

On appeal, Bridgestone and Firestone likewise argue that these statements were immaterial puffery. With one important exception - the statement in Firestone's August 1, 2000 concerning "objective data" - we agree that the statements recited above are best characterized as loosely optimistic statements insufficiently specific for a reasonable investor to "find them important to the total mix of information available." *In re Ford*, 381 F.3d at 570-71 (quoting *Shaw*, 82 F.3d at 1217)). These statements, both on their own terms and in context, lacked a standard against which a reasonable investor could expect them to be pegged; such statements describing a product in terms of "quality" or "best" or benefitting from "aggressive marketing" are too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision. The statements are analogous to those deemed immaterial by abroad spectrum of federal courts. *See, e.g., Longman v. Food Lion, Inc.*, 197 F.3d 675, 684 & n.2 (4th Cir. 1999) (concluding that the statements that "Food Lion is one of the best-managed high growth operators in the food retailing industry" and that it provided its employees with "some of the best benefits in the supermarket industry" were "immaterial puffery"); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1121 (10th Cir. 1997) (holding that a company's statement that it had achieved "substantial success" in integrating the sales force of two merged companies was "an immaterial statement[] of corporate optimism"); *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 811 (2d Cir. 1996) (holding that a company's statements that it was "optimistic" about its

earnings and "should deliver income growth consistent with its historically superior performance" was non-actionable "puffery"); *In re Cybershop.com Sec. Litig.*, 189 F. Supp. 2d 214, 229 & 232 (D.N.J. 2002) (holding that the statement that "we are well prepared for the holiday season and believe it will clearly differentiate us as the leader in our segment of online retail" was not material); *In re Peritus Software Servs., Inc. Sec. Litig.*, 52 F. Supp. 2d 211, 220 (D. Mass. 1999) (holding that the statement that company's product was enjoying "unprecedented market demand" was non-actionable puffery). We conclude that the district court did not err in dismissing the claims based on these statements.

Firestone's August 1, 2000 Press Release: "Objective Data" Statement. We reach a different conclusion, however, with respect to the statement in Firestone's August 1, 2000 press release. In that press release, Firestone stated: "we continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires." The context of statements is often telling. *See, e.g.*, *Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989) ("What might be innocuous 'puffery' or mere statement of opinion standing alone may be actionable as an integral part of a representation of material fact when used to emphasize and induce reliance upon such a representation."); *Scritchfield v. Paolo*, 274 F. Supp. 2d 163, 175-76 (D.R.I. 2003) (stressing that "a company's statements that it is 'premier,' 'dominant,' or 'leading' must not be assessed in a vacuum (i.e., by plucking the statements out of their context to determine whether the words, taken *per se*, are sufficiently 'vague' so as to constitute puffery")). So it is with Firestone's August 1, 2000 statement. In July 2000, consumers filed multiple lawsuits against Firestone alleging that ATX tire tread separation caused Ford Explorers to roll over and caused fatalities. That same month, several safety groups

urged Ford to recall the Explorers with Firestone ATX tires on them. On August 1, 2000, Firestone issued the statement concerning the "objective data." A reasonable juror could infer that the "objective data" representation was a direct response to the lawsuits, or to the public challenges to the safety of Firestone's tires, or to both.

A reasonable juror could also conclude that the statement, without some qualification or accompanying disclosure of the numerous pieces of evidence that tended to cut the other way, was a misrepresentation. In 1996, Firestone had performed random quality control high-speed durability tests on ATX tires. In one of the sample tests, Firestone examined 129 ATX tires made at the Decatur plant. Eighteen of those tires failed the test due to tire tread separation. In another random test of 229 ATX tires from Decatur, thirty-one failed. In an additional random test of 18 ATX tires, eight failed, seven of which were from the Decatur plant. Internal Firestone documents show that Firestone knew since 1996-1997 from property damage and injury claims and tire performance data, such as warranty adjustments and financial analysis of such claims, that its ATX tires were failing at unprecedented rates. Similarly, a Firestone chart reveals that from 1998 to 1999, tread separations for the Wilderness ATX tires--one of the ATX models--increased by 194%. According to a 1999 internal Firestone report, in 1997 and 1998, another of the ATX models--the ATX II tires--accounted for the majority of Firestone's claims but less than 10% of its total production. Further, in Venezuela, between 1990 and 1998, over forty people were killed in Explorer accidents due to ATX tire failures and Ford had demanded that Firestone alter the design of its ATX tire being sold in Venezuela to include a nylon layer.

Firestone does not point to any record evidence showing its statement regarding the "objective data" was supported with respect to the ATX tires. It may be the case that at the summary judgment or trial stages of this dispute, Firestone will identify evidence that persuades the finder of fact that, as of the date of its statement on August 1, 2000 that "properly inflated and maintained Firestone ATX . . . tires are among the safest tires on the road today," *id.* at 171, the available objective data supported that claim. Or perhaps Firestone will introduce some other evidence showing that its statement about the objective data was in fact not misleading or false. However, at this stage in the lawsuit, construing the Complaint in a light most favorable to the Retirement Fund, *see PR Diamonds*, 364 F.3d at 680, we conclude that Firestone's representation concerning "objective data" could be deemed a material misrepresentation by a reasonable fact-finder. *See, e.g., Hanon v. Dataproducts Corp.*, 976 F.2d 497, 502 (9th Cir. 1992) (holding that the defendants' statements emphasizing superior quality were material because "a reasonable jury could conclude that [the company] publicly released optimistic statements . . . when it knew [its product] could not be built reliably"); *In re ValuJet, Inc. Sec. Litig.*, 984 F. Supp. 1472, 1477-78 (N.D. Ga. 1997) (statement that airline's safety record was "certifiably among the very best in the airline industry" was material and actionable); *In re F & M Distribs. Inc. Sec. Litig.*, 937 F. Supp. 647, 653 (E. D. Mich. 1996) (holding that the defendant chain store's failure to disclose an adverse industry trend that made the "deal buying" strategy touted in its prospectus less viable than otherwise known could be actionable); *In re Medimmune, Inc. Sec. Litig.*, 873 F. Supp. 953, 967 (D. Md. 1995) (holding that a drug company's statements that "the results of treatment with [its product] were highly statistically significant along all of the efficacy parameters," and "the data are overwhelmingly good" were

material and actionable); *Cohen v. Prudential-Bache Sec., Inc.*, 713 F. Supp. 653, 658 (S.D.N.Y. 1989) (holding that a broker's statement to a client that she "would receive a very strong cash flow without risk to her initial investment" could not be dismissed as immaterial puffery).

In holding that Firestone's August 1, 2000 statement was actionable, we express no opinion as to whether Firestone necessarily had an obligation to disclose the various safety and looming regulatory issues surrounding the ATX tires regardless of whether it affirmatively spoke on the subject. The Retirement Fund does not rely on that allegation and, indeed, has waived such an argument. *See* App. at 558 (the Retirement Fund stating in a brief to the district court that "plaintiffs do not contend that in the face of defendants' silence they should have disclosed the defects in the ATX tires."). We merely hold that once Firestone elected to make statements such as the statement regarding the "objective data," it was required to qualify that representation with known information undermining (or seemingly undermining) the claim. *See Mayer v. Mylod*, 988 F.2d 635, 639 (6th Cir. 1993) ("Corporate officers are not required to speak, but once they do, they must be truthful if their comments are material to investors' decisionmaking."); *In re K-tel Intern, Inc. Sec. Litig.*, 300 F.3d 881, 896, 898 (8th Cir. 2002) ("The requirement is not to dump all known information with every public announcement, but the law requires 'an actor to provide complete and non-misleading information with respect to the subjects *on which he undertakes to speak*.'" (quoting *Helwig*, 251 F.3d at 561) (emphasis added by Eighth Circuit).[19]

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[19] Contrary to Bridgestone and Firestone's assertions, such a conclusion is consistent, or not inconsistent, with this court's decision in *Sofamor Danek*, 123 F.3d at 401-02. In that case, the

Firestone also argues that the August 1, 2000 statement is non-actionable because it was "immaterial as a matter of law." Appellee Firestone's Br. at 40. Echoing the district court, Firestone argues that the statement was one of '"of general optimism and in its defense of its products,'" *id.* (quoting App. at 1018), and one that "reflected the market's understanding that others had suggested the products were not as safe as Firestone believed." Appellee Firestone's Br. at 47. As such, Firestone argues, the statement does "'not come within the duty of disclosure,'" *id.* at 44 (quoting *Sofamor Danek*, 123 F.3d at 402), because such opinions are '"routinely discounted by reasonable investors," *id.*

We reject this argument also, for several reasons. First, we do not agree that the statement that "the objective data clearly reinforces our belief that these are high-quality, safe tires" was a statement of general optimism or purely opinion. Rather, the statement was an assertion of a relationship between data and a conclusion, one that a finder of fact could test against record evidence.

Second, even if the statement regarding "objective data" was best classified as an opinion, it was still specific enough to form the basis of an actionable securities fraud claim. Federal courts have drawn the line on whether a statement may be actionable based, not on whether in the abstract a statement was best characterized as fact or opinion but, rather, if it was an opinion, on the nature of the statement. The key is whether the proposition at issue can be proven or

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defendant corporation was silent as to the alleged product defects and likely regulatory problems and this court held there was no actionable omission. In contrast, Firestone (and Bridgestone) chose to speak, implicating, through that choice, the duty to speak truthfully as to the topics on which it spoke.

disproven using standard tools of evidence. Thus, as alluded to above, vague statements not subject to verification by proof are generally deemed non-actionable puffery. But "opinion or puffery . . . in particular contexts when it is both *factual and material* . . . *may* be actionable." *Longman*, 197 F.3d at 683 (emphasis added).

For example, in *Virginia Bankshares*, the Supreme Court held that an opinion expressed by a corporation's board members to its minority stockholders that the stock price of $42.00 for the purchase of the company's shares was a "high value" and represented a "fair" transaction could be both factual and material. 501 U.S. at 1093. In so holding, the Court expressly rejected the petitioner's argument, similar to that offered by Firestone here, that the Court "would invite . . . amorphous issues outside the readily provable realm of fact if [it] were to recognize liability . . . on proof that the directors did not recommend the merger for the stated reason." *Id.* at 1091. "It is no answer to argue," the Court stated, "that the quoted statement on which liability was predicated did not express a reason in dollars and cents, but focused instead on the 'indefinite and unverifiable' term, 'high' value, much like the similar claim that the merger's terms were 'fair' to shareholders." *Id.* at 1093. "The objection ignores the fact," observed the Court, "that such conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." *Id.* Rather, "provable facts either furnish good reasons to make a conclusory commercial judgment, or they count against it, and expressions of such judgments can be uttered with knowledge of truth or falsity just like more definite statements, and defended or attacked through the orthodox

evidentiary process that either substantiates their underlying justifications or tends to disprove their existence." *Id.*[20]

This court's en banc decision in *Helwig* also reflected these insights. In that case, the defendant corporation stated that it was "comfortable" with favorable earnings per shares estimates made before the passage of a piece of legislation even though in secret, internal communications, the corporation was making negative predictions about the impact of the statute on earnings. *Helwig*recognized that such opinions about a verifiable assertion "contain 'at least three implicit factual assertions: (1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement.'" *Helwig*, 251 F.3d at 557 (quoting *Schneider v. Vennard (In re Apple Computer Sec. Litig.)*, 886 F.2d 1109, 1113 (9th Cir. 1989)). Reversing the district court's dismissal of the securities fraud claim, *Helwig* noted that unlike the facts underlying this court's decisions in "*Sofamor Danek*, [in which] the information claimed as adverse to the company had already been disclosed and was publicly available to permit an independent assessment by investors and analysts," or "*Starkman*, [which] was a case about non-disclosure," *id.*, the complaint in *Helwig* "was about *selective* disclosure of

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[20] This court has recognized that "*Virginia Bankshares* is instructive for" materiality analysis in § 10(b) cases because although the Court in *Virginia Bankshares* was concerned with § 14(a), not § 10(b) of the Securities Exchange Act, "the [SEC] has promulgated the same rule for each section: violations occur under each section whenever a statement is false or a material omission makes the statements which are made misleading." *Mayer v. Mylod*, 988 F.2d 635, 639 n.2 (6th Cir. 1993) (citing 17 C.F.R. § § 240.10b-5 and 240.14a-9 (1991)).

information . . . essential to complete a picture [the defendants] had only partially revealed." *Helwig*, 251 F.3d at 560 (emphasis added). "The protections for soft information," *Helwig* stated, "end where speech begins." *Id.*

As in *Helwig*, the Retirement Fund's Complaint pleads a theory of liability for selective, incomplete disclosure. Following *Helwig*, we conclude that a reasonable juror in this case could conclude that Firestone's statement that "the objective data clearly reinforces our belief that these are high-quality, safe tires" carried with it the representation that there was a reasonable basis for that belief, and that Firestone was not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement, and that both those representations were misleading. That juror could thus find that the statement concerning objective data was actionable. *Accord Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996) (holding that a company's statements regarding the safety of its new products were actionable where the reassuring statements "were designed to prevent shareholder flight in the aftermath of a damaging report regarding the possible hazards of [the product]").

Finally, as to Firestone's contention that the statement about the "objective data" is non-actionable because it "reflected the market's understanding that others had suggested the products were not as safe as Firestone believed," Appellee Firestone's Br. at 47, this argument mischaracterizes the facts as pled in the Complaint. A number of courts have indeed suggested that misrepresentations about a fact already known to the marketplace are not actionable.[21]

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[21] *See, e.g., Longman*, 197 F.3d at 684 ("Plaintiffs' securities fraud claim cannot succeed because, despite the fact that Food Lion denied the charges, the nature of the off-the-clock claims and the

And, although this Court has not directly addressed this theory, it voiced the logical complement in *Helwig*, which, in reaching its conclusion that the statement at issue was material, relied in part on the fact that the information at issue was "known *exclusively*" to the defendants. 251 F.3d at 560 (emphasis added). It makes logical sense that a claim based on the alleged withholding from the public of information that contradicts information publicly stated is defeated by a demonstration that the allegedly withheld information was in fact disclosed to the public; however, that rule is not apposite here. Contrary to the implications of Firestone's argument, that "others" had "suggested the products were not as safe as Firestone believed" does not demonstrate that the market had received the adverse information--about the tires' test data, the claims for liability based on tire failure, and the deaths in the United States and abroad--that form the basis of the information the Retirement Fund alleges was withheld from the public. Rather, in an open and efficient securities market "information important to reasonable investors (in effect, the market) is immediately incorporated into stock prices." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1425 (internal citation omitted). And, indeed, not until after Firestone's August 9, 2000 recall did the share value for both the Bridgestone common stock and Bridgestone ADRs each plummet by over one third of their value in approximately six weeks: between August 8, the day before the recall, and September 21, 2000, Bridgestone's common stock share price

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claims' risk to earnings were in fact well known to the market before the Prime Time Live broadcast, and therefore Food Lion's omissions were not material."); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1115 (9th Cir. 1989) ("We conclude that in a fraud on the market case, the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources.").

on the Tokyo stock exchange dropped from over $2,200.00 to less than $1,400.00, and its ADR share price from over $202.00 to less than $122.00. Accordingly, a reasonable juror could conclude that the revelations that accompanied the announcement of the August 2000 recall were in part reflected in this substantial share price change, which would suggest strongly that the market had not--prior to the public disclosures encapsulated in the recall--received the full extent of information related to the safety-related problems associated with Firestone's tires, and that such information was quite important to investors.

For the foregoing reasons, we hold that while most of the statements alleged by the Retirement Fund were insufficiently specific to be actionable, the August 1, 2001 statement regarding "objective data" is actionable. We turn now to Bridgestone's alleged misrepresentations in the Annual Reports' financial statements.

b. Financial Statements in Bridgestone's Annual Reports

The district court held that none of the claims based on financial statements in Bridgestone's Annual Reports for fiscal years 1996 through 1999 were actionable. The district court reasoned that the Complaint "failed to plead a single fact that would have caused a reasonable investor to believe that Bridgestone's financial statements were prepared according to United States GAAP, or that a reasonable investor would have relied on this belief," failed to "plead any particular fact that could establish any inference that Bridgestone violated Japanese GAAP," and that "even if Bridgestone was subject to United States GAAP," the Complaint "failed to plead with particularity any facts establishing a strong inference that Bridgestone should have 'considered probable' a Firestone recall and thus established a huge contingent liabilities fund."

App. at 1016 (quoting FASB 5). Bridgestone argues that we should affirm on essentially the district court's rationales. As discussed below, we disagree with that conclusion with respect to the statement in Bridgestone's 1999 Annual Report, but agree with the result reached by the district court concerning the claims based on the financial statements in Bridgestone's 1996-1998 Annual Reports.

I. Bridgestone's 1999 Annual Report

Issued in March 2000, Bridgestone's 1999 Annual Report included at least two representations that a reasonable juror might conclude were material misrepresentations: (1) that no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions (the "No Impairment" representation); and (2) that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires (the "No Loss" representation).

(a) The "No Impairment" Representation

The 1999 Annual Report included several groups of statements that, taken together, constituted a representation to the investing public that no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions. The below comparison of the Annual Report's accounting policy statements, the actual disclosures under those statements, and the alleged "on the ground" facts at Bridgestone and Firestone, reveals why a reasonable juror could conclude that this statement was a misrepresentation.

The accounting policy statements communicated to the investing public that if a loss or asset impairment was

probable, the Annual Report would disclose that contingency in some form. The 1999 Report included a letter from Bridgestone's outside auditors stating that it was prepared "inconformity with accounting principles generally accepted in Japan applied on a consistent basis." Under International Accounting Standard § 9010.08-.09, applicable in Japan pursuant to the International Accounting Standards Committee, "loss contingencies should be recorded if it is probable that an asset has been impaired or a liability incurred at the balance sheet date and a reasonable estimate of the amount of the resulting loss can be made." Section 9010.08-09 provides further that "if either of the conditions is met and the possibility of the loss is not remote, the existence of the contingent loss should be disclosed in the financial statements." The 1999 Report also stated that "the Japanese consolidated financial statements have been prepared in accordance with the provisions set forth in the . . . accounting principles and practices generally accepted in Japan ('Japanese GAAP')." It further represented that Bridgestone's "accompanying financial statements include the accounts of certain foreign subsidiaries, which are based upon U.S. GAAP," a reference to Firestone, its largest foreign subsidiary. We thus disagree with the district court's observation that no investor could have reasonably concluded that a representation was being made under United States GAAP.

United States GAAP, via FASB 5,[22] "requires that loss be accrued whenever it is probable a loss has been incurred or an asset impaired and the amount of the loss can be reasonably estimated. If the loss is at least reasonably possible, but no reasonable estimate can be made, the contingency at a minimum should be disclosed." The unmistakable representation, under both the Japanese and American GAAP policies,[23] was that if a loss or asset impairment was probable, the Annual Report reader would see a discussion of it in some form in the report. A fortiori then, the Report included the representation that if there were a substantial certainty of such an impairment, that contingency or risk would be disclosed. *Cf. United States v. Lamartina*, 584 F.2d 764, 766 (6th Cir. 1978) (embracing this greater-includes-the-lesser logic in the criminal context and noting that "a defendant may be found guilty of an offense necessarily included in the offense charged.").

The disclosures under the Annual Report's stated policies included no reference to the impairment or likelihood of impairment to the asset of the Firestone Brand. The notes to

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[22] In the United States, GAAP "are the official standards adopted by the American Institute of Certified Public Accountants (the "AICPA"), a private professional association, through three successor groups it established: the Committee on Accounting Procedure, the Accounting Principles Board (the "APB"), and the Financial Accounting Standards Board (the 'FASB')." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 160 n.4 (2d Cir. 2000). "The SEC treats the FASB's standards as authoritative." *Id.*

[23] The policies articulated in FASB 5 and § 910.08-09 are very similar if not identical in substance. The absence on Note 11's list of differences between U.S. and Japanese GAAP of any reference to the two provisions reinforces that notion.

the Consolidated Financial Statements did include a category labeled "Contingent Liabilities," which disclosed deferred income tax assets, deferred tax liabilities, discounted export bills, and lease commitments, note regarding "Market Value Information," which provided a disclaimer that Bridgestone was "exposed to the currency fluctuation risks in relation" to certain "forward contracts and to the interest rate fluctuation in relation to interest rate swaps," as well as statements cautioning that "those derivatives do not exceed corresponding financial instruments," and that Bridgestone" believes that the risk that the counterparts will not be able to fully satisfy their obligations under contracts is minimum." However, neither the Contingent Liability section nor the Market Value Information section, nor any other portion of the 1999 Annual Report, disclosed the contingency of any loss or asset impairment related to any of the Firestone tire products due to the lawsuits, regulatory scrutiny, or safety-related reasons. Nor did they disclose the potential risk of such an event.

The 1999 Annual Report's simultaneous inclusion of the accounting policies, the listed contingencies, and the absence of any mention of a contingency concerning Firestone tires constituted a representation that no loss or asset impairment arising from Firestone tire products due to the lawsuits, regulatory scrutiny, or safety-related reasons was "probable" or "reasonably possible." The question then is whether a reasonable juror could find that the facts belied that representation.

Bridgestone suggests that it is only in hindsight evident that there was a probability or reasonable possibility of a substantially adverse event as of March 2000. We disagree. By March 2000, Bridgestone and Firestone, according to the allegations of the Complaint, had received thousands of

claims for and complaints concerning ATX tire failures, covering hundreds of serious injuries and 174 fatalities by 2000 allegedly resulting from problems with the tires. Firestone had paid off State Farm for the costs of automobile accidents attributable to ATX tire failures. The investigations and scrutiny by the Arizona and Venezuelan governments reinforces the impression that evidence was present of serious risks of adverse consequences for the ATX brand. From 1998 to 1999, tread separations for one ATX model increased by 194%. In 1997 and 1998, another of Firestone's ATX model's tires accounted for the majority of the company's claims but during those same years, that model accounted for less than 10% of Firestone's total production. These claims, suits and payments were discussed at least quarterly from 1997 to 1999 in meetings that consisted of Firestone's senior management group, including Bridgestone Executive Vice-president Ono, and Firestone's financial group, quality group, and public relations / marketing department. A major decision such as a recall by a Fortune 500 corporation is unlikely to simply materialize out of the blue. As the Complaint alleges, the various increasing problems at Firestone crescendoed in 1998 and 1999. From the facts pleaded, assumed to be true, and construing the complaint in the light most favorable to the plaintiffs, it was, under all these circumstances, at least "reasonably possible" if not "probable" that, as of March 2000, the Firestone flagship brand ATX tires would experience a serious, adverse, financial event--an impairment of the asset. Bridgestone's effective representation that no loss or asset impairment arising from Firestone tire products due to the lawsuits, regulatory scrutiny, or safety-related reasons was "probable" or "reasonably possible" could thus be deemed by a reasonable juror to have been a misrepresentation based on the facts available at that time.

The question, then, is whether the "No Impairment" representation was material. Put another way, was it "'*so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of [its] unimportance?*'" *Helwig*, 251 F.3d at 563 (quoting *Ganino*, 228 F.3d at 162) (emphasis added by *Helwig*). We conclude that it was not. The 1999 Annual Report included at least six statements that stressed to shareholders or potential shareholders the significance of the Firestone brand or the American and North American market, of which Firestone was Bridgestone's major brand: (1) "We are determined to assert a singular advantage in product technology. . . . We increased our market share in North America in 1999 in . . . the original equipment market. Our North American operations are approaching a market share of 20%."; (2) are presentation that as a percentage of Bridgestone's net sales, its sales in the Americas were 41.5 %, the largest of any geographic sector; (3) "we increased our market share in North America in 1999 . . . Demand for original equipment tires continued to grow in 1999 in the booming North American automobile market"; (4) a statement under the bold, purple-colored, large font label of "Trends And Topics" that "our multibrand strategy–centered on . . . Firestone . . . raised our market profile further in 1999;" (5) "aggressive product development and strategic marketing have re-established the Firestone name as a vigorous brand in premium-grade tires, as well as in large-volume, middle-market tires;" and that (6) "as a major supplier to leading European automakers, we have developed business with the North American operations of those automakers, too. We also supply tires to nearly all the Japanese-owned vehicle plants in North America." Firestone's financial and brand name health was of obvious importance to the overall state of Bridgestone's financial health. That relationship was evident both from its portrayal in the Annual Reports and in the

severely adverse results that resulted immediately after the asset impairment occurred: in addition to the stock and ADR share price drops, recall that Firestone and Bridgestone each experienced a net $510 million loss for the 2000 fiscal year and that Bridgeport's net earnings in 2000 were 80% less than in fiscal year 1999. We conclude--at a minimum--that the probability or reasonably possibility of Firestone's brand name experiencing a significant asset impairment was not information "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of [its] unimportance." *Id.* (internal quotations omitted and emphasis omitted) This information was therefore not "immaterial" within the meaning of the federal securities laws. 15 U.S.C. § 78u-5(c)(1)(A)(ii). A reasonable juror could conclude that Bridgestone's "no impairment" representation in the 1999 Annual Report was actionable.

(b) The "No Loss" Representation

The second representation from Bridgestone's 1999 Annual Report that a reasonable jury could conclude was actionable was its effective representation that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires. FASB 5 "requires accrual by a charge to income (and disclosure) for an estimated loss from a loss contingency if two conditions are met: (a) information available prior to issuance of the financial statements indicates that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements, and (b) the amount of loss can be reasonably estimated." The Retirement Fund asserts that both FASB 5 and its Japanese analogue gave rise to a duty to disclose because Bridgestone "had specific knowledge throughout the Class Period that [it was] already incurring

substantial loses through the replacement of tires, settlements of lawsuits and payment of claims." Appellant's Br. at 47.

Bridgestone responds on this point with two arguments. First, it argues that the Complaint's claims based on problems related to the tires' safety record are an impermissible attempt to plead fraud by hindsight. Bridgestone asserts that "the Retirement Fund has simply seized upon disclosures made in later annual reports and alleged that they should have been in earlier ones." Appellees Bridgestone and Kaizaki's Br. at 30 (internal quotations omitted). This is literally true but does not mean that the Complaint advances an impermissible theory of liability: the losses already sustained as of March 2000 were clearly facts reasonably (and actually) available to Bridgestone in an amount calculable with precision or near-precision as of March 2000; if they were material and subject to disclosure under the stated accounting policies, it is no answer to say they were eventually disclosed later in time.

Bridgestone's second and more forceful argument is that these losses were not material. Bridgestone asserts that "the complaint contains no pleaded fact indicating Bridgestone knew about any substantial losses or that those amounts . . . actually were substantial for an $18 billion company." Appellees Bridgestone and Kaizaki's Br. at 29 (internal quotations omitted). "Indeed," Bridgestone argues, "every manufacturer replaces its products, settles lawsuits, and pays claims as part of its day-to-day business; yet, no one would contend these activities alone require reserves." *Id.*

This argument is ultimately unpersuasive for three reasons. First, assuming the truth of the facts set forth in the Complaint, by March 2000--when the Bridgestone 1999 annual Report was issued--over 2000 rollover accidents, 700 serious injuries and 170 fatalities had occurred yielding

thousands of claims for and complaints concerning ATX tire failures and Bridgestone (via Firestone) incurred numerous categories of financial losses, including those affiliated with entering into numerous settlement agreements with the injured parties involving compensation, reimbursing State Farm, absorbing the cost of replacing the tires in Arizona, and absorbing the cost of adding a nylon layer to its tires in Venezuela. A reasonable juror could infer from this category-based evidence (as opposed to dollar-amount-based evidence not included in the Complaint) that the related losses were substantial. That the Retirement Fund has not through disclosure at this pre-discovery stage identified the precise amount of the payments as of March 2000, or amounts corresponding to agreements reached by Bridgestone or Firestone by March 2000 for sums not as of then yet paid out, is no bar to the claim. The precise information as to dollar amount is presumably available thus far only to Bridgestone and may well emerge in discovery. It is enough at this motion to dismiss stage that the Complaint alleges specific losses via seemingly out of the ordinary payments on this wide array of issues, each of which, as stated, was a definite amount that had already been paid out by the time of the release of the subsequent annual report. *See* FASB 5 (requiring the disclosure of "information available prior to issuance of the financial statements indicating that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements" the amount of which can "be reasonably estimated").

Second, while it is likely the case that not every settlement or claim requires a reserve, that is besides the point here. These payments were not as a group routine or minor; they covered thousands of claims that alleged a common problem with a major product of Bridgestone's largest subsidiary in its highest volume sales market, the Americas. Because the 1999

Annual Report represented that there were no actual losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires' failures, there was a duty to disclose any material information to the contrary, be it in the form of a reserve, notice of a contingency, or some other form of disclosure.

Third, to the extent the materiality question is close, the general rule for securities fraud cases is that "at [the motion to dismiss] stage in the proceedings, a complaint may not properly be dismissed on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their unimportance." *Helwig*, 251 F.3d at 563 (internal citations, quotations, ellipses and emphasis omitted). Courts "generally reserve such questions for the trier of fact." *Id.* (collecting cases). We think this approach is appropriate here, both because a reasonable juror could find this claim actionable and because we are reversing on independent grounds with respect to a separate statement in the 1999 Annual Report.

ii. 1996-1998 Annual Reports

With respect to the financial statements for the Annual Reports for fiscal years 1996 to 1998, we conclude that the district court did not err in dismissing the claims based on those statements. Unlike the 1999 Annual Report, these reports contained no representation to the effect that United States GAAP standards applied. Any claim, if at all, based on these Annual Reports would have to be based solely on the implied statement (to American investors at that) that International Accounting Standard § 9010.08-.09 applied. Most significantly, much of the evidence that the Complaint relies on as establishing that the asset was impaired or likely

to suffer impairment became fully available after March of 1999, when the last of these three reports was issued, particularly the data summary on the 34 suits against Bridgestone based on deaths or injuries by consumers of Firestone-equipped Ford Explorers from rollovers allegedly caused by Firestone tires, the tread separations increases from 1998 to 1999, and the dramatic rise in problems in 1998 and 1999. The facts tending to undermine the truth of the Annual Reports' representations regarding impairment and loss were thus not known at all or not known to their full extent as of the dates that the Annual Reports for the 1996--1998 fiscal years were issued.

For the foregoing reasons, we conclude that the Complaint pleaded three actionable claims: (1) Firestone's August 1, 2000 "objective data" representation; (2) Bridgestone's "No Impairment" representation; and (3) Bridgestone's "No Loss" representation.

2. Scienter

Mindful that to survive a motion to dismiss, a federal securities fraud claim must "withstand an exacting statement-by-statement analysis," *In re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 886 (W.D.N.C. 2001), the question then is whether the Complaint adequately pled scienter for these particular statements as against Bridgestone, Firestone, or Ono. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12, 96 S. Ct. 1375, 47 L. Ed. 2d 668. "As with all fraud claims, Federal Rule of Civil Procedure 9(b) applies to pleading a defendant's state of mind, allowing that 'malice, intent, knowledge, and other condition of mind of a person may be averred generally.'" *PR Diamonds*, 364 F.3d at 682 (quoting Fed. R. Civ. P.9(b)).

However, in 1995, Congress having "concluded that Rule 9(b) had 'not prevented abuse of the securities laws by private litigants,'"[24] enacted the Private Securities Litigation Reform Act ("Reform Act"). The Reform Act grafted on "special requirements for pleading scienter in federal securities fraud cases." *PR Diamonds*, 364 F.3d at 682. As amended by the Reform Act, the securities laws provide:

> In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state *with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.*

15 U.S.C. § 78u-4(b)(2) (emphasis added). Under the Reform Act, if a plaintiff does not meet this requirement, the reviewing district court "shall, on the motion of any defendant, dismiss the complaint." 15 U.S.C. § 78u-4(b)(3).[25] In enacting the Reform Act's scienter-related

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[24] *Comshare*, 183 F.3d at 548 (quoting H.R. Conf. Rep. No. 104-369 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 818).

[25] We take no position as to the constitutionality of the Reform Act's heightened scienter pleading requirements. The Seventh Amendment to the Constitution provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. Am. VII. Traditionally, there has been a right to jury trial for securities fraud claims. *See, e.g., SEC v. Infinity Group Co.*, 212 F.3d 180, 196 (3d Cir. 2000). The Reform Act compels dismissal unless the facts

provisions, Congress sought simultaneously to curb frivolous securities fraud litigation, which "'unnecessarily increases the cost of raising capital and chills corporate disclosure, [and is] often based on nothing more than a company's announcement of bad news, not evidence of fraud,'" *Comshare*, 183 F.3d at 548 (quoting S. Rep. No. 104-98 (1995), 1995 U.S.C.C.A.N. 679, 690), and "to protect investors and to maintain confidence in the securities markets." H.R. Conf. Rep. No. 104-369, at 31 (1995), 1995 U.S.C.C.A.N. 730. Reflecting this balance, this court has noted that after the Reform Act, for those complaints advancing non-frivolous, well-pled allegations of scienter, "our willingness to draw inferences in favor of the plaintiff remains unchanged." *Helwig*, 251 F.3d at 553; *see also id.* (rejecting an interpretation of the Reform Act under which "it [would] become a choke-point for meritorious claims").

In elaborating on the meaning of the statute's term "strong inference," *Helwig* explained that "inferences must be reasonable and strong--but not [necessarily] irrefutable." *Id.* The Complaint "need not foreclose all other characterizations of fact, as the task of weighing contrary accounts is reserved for the fact finder." *Id.* Rather, under the "strong inference" requirement, the Retirement Fund is "entitled only to the most plausible of competing inferences." *Id.* "'Strong inferences'. . . involve deductive reasoning; their strength

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pleaded in the Complaint produce a "strong inference that the defendant acted" with scienter. 15 U.S.C. § 78u-4(b)(2). One might argue that for cases where a juror could conclude that the facts pleaded showed scienter, but that conclusion would not be the most plausible of competing inferences, a Seventh Amendment Problem is presented. However, the Retirement Fund has not advanced any such argument and we decline to address the merits of this constitutional question sua sponte.

depends on how closely a conclusion of misconduct follows from a plaintiff's proposition of fact." *Id.* (quoted with approval in *In re Ford*, 381 F.3d at 568). Our task is thus to determine whether the Complaint alleges facts that, if true, would, by forming the basis for a strong inference, "convince a reasonable person that the defendant knew a statement was false or misleading." *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1105 (10th Cir. 2003). Ultimately, in our scienter analysis, we "employ[] a totality of the circumstances analysis whereby the facts argued collectively must give rise to a strong inference of at least recklessness." *PR Diamonds*, 364 F.3d at 683. "'This necessarily involves a sifting of allegations in the complaint.'" *PR Diamonds*, 364 F.3d at 684 (quoting *Helwig*, 251 F.3d at 551). Towards that end, *Helwig* identified nine factors that, while "not exhaustive," are "helpful" in determining whether the facts as pled are "probative" of scienter in securities fraud actions:

(1) insider trading at a suspicious time or in an unusual amount;

(2) divergence between internal reports and external statements on the same subject;

(3) closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information;

(4) evidence of bribery by a top company official;

(5) existence of an ancillary lawsuit charging fraud by a company and the company's quick settlement of that suit;

(6) disregard of the most current factual information before making statements;

(7) disclosure of accounting information in such a way that its negative implications could only be understood by someone with a high degree of sophistication;

(8) the personal interest of certain directors in not informing disinterested directors of an impending sale of stock; and

(9) the self-interested motivation of defendants in the form of saving their salaries or jobs.

251 F.3d at 552 (citing *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196 (1st Cir. 1999)) (in turn, collecting cases). With these standards in mind,[26] we turn to analyze scienter as to each of the three relevant defendants, the two corporate legal persons--Firestone and Bridgestone--and the one individual, Firestone CEO and Bridgestone Executive Vice-President Ono. *Id.*

a. Scienter as to Firestone

On August 1, 2000, Firestone released its statement that "we continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires." With respect to Firestone's scienter concerning this statement, at least five of the nine non-exclusive *Helwig* factors are apparent in the Complaint's alleged facts. First, there was a clear "divergence between

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[26] We note that, contrary to Bridgestone's and Firestone's arguments, which rely heavily on *In re Carter-Wallace Inc. Sec. Litig.*, 220 F.3d 36 (2d Cir. 2000), and *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000), the precedent of this circuit frames our scienter inquiry in this claim for securities fraud based on partial or incomplete disclosure.

internal reports and external statements on the same subject,"*Helwig*, 251 F.3d at 552; witness the contrast between the data known or available to Firestone as of August 2000--concerning the evidence of defective tires from Decatur and three years of a marked rise in the rates of deaths, injuries and claims and lawsuits based on several thousand rollover accidents, hundreds of injuries, and nearly 200 fatalities in the United States, over forty deaths in Venezuela, the multiple deaths in Saudi Arabia--versus the unqualified positive comments on the "objective data." Firestone's awareness of the circumstances at the Decatur plant, including in particular the strike, the untrained replacement workers, the production schedule time increase imposed by Bridgestone and Firestone in the labor negotiations with the union, and the test results pointing to higher rates of problems in the Decatur-produced ATX tires, make the imputation of scienter reasonable.[27]

Other factors reinforce this conclusion. There was a "closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information," *id.*; the August 1 statement about "objective data" was followed one week later by the recall of 6.5 million tires and four months later by the admission that many of the tires from the Decatur plant were made with a shoulder pocket more likely to crack than normal due to an improper angle and were more likely to fail to stick together properly. There was also a "disregard," or at least a seeming disregard, of "the most current factual information before making statements."

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[27] Arguably, the known background of the 1979 recall based on a faulty adhesion compound discovered after Firestone's public disavowals of such a problem and the strikingly similar pattern to the problems identified in Firestone's 2000 investigative report makes it that much more reasonable to impute scienter to Firestone.

Id. Further, to the extent Firestone disclosed its data to Bridgestone in a form substantially similar to that presented in Bridgestone's Annual Reports, Firestone's "disclosure of accounting information [was made] in such a way that its negative implications could only be understood by someone with a high degree of sophistication." *Id.* Finally, assuming, as the Complaint alleges, that Bridgestone executives "kept the accident rate data which they had and which showed these serious problems from safety regulators . . . so they could report huge profits and their executives could retain their positions of power, prestige and profit and Bridgestone's stock and ADRs would continue to trade at inflated, higher prices, providing the executives with direct economic benefits based on their stock holdings and options and allowing them to personally pocket huge bonuses based on corporate profits," there was thus a "self-interested motivation of defendants in the form of saving their salaries or jobs." *Helwig*, 251 F.3d at 552.[28]

Three of the nine *Helwig* factors are clearly absent as pertains to Firestone, although in a sense these factors all go to the same question: conflict of interest. That is, there is no evidence of alleged insider trading at a suspicious time or in an unusual amount, no evidence of bribery by a top company official, and no evidence of personal interest of certain directors in not informing disinterested directors of an impending sale of stock.

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[28] We reject Firestone's suggestion that the withholding of information by senior corporate executives to effectuate an inflation of the executives' bonuses, stock prices, and job security is an "ordinary corporate event." Appellee Firestone's Br. at 45. Even if a regular occurrence, it is not an event this court sanctions as being legitimately ordinary.

That covers eight of the nine *Helwig* factors. A word is in order on whether the remaining factor is present, i.e. whether there is the "existence of an ancillary lawsuit charging fraud by a company and the company's quick settlement of that suit." *Id.* There is not, strictly speaking, such evidence because the claims in question were not based on fraud per se. However, the presence of closely related evidence carries some weight, particularly given that the list of factors is "non-exhaustive." *Id.* Firestone entered into multiple settlement agreements in response to product liability suits under which the settlement agreements with plaintiffs were sealed, the parties entered into stipulated protective orders to conceal discovery, and Firestone would have returned to it "damaging documents." The gravamen of these claims and lawsuits, though framed as pre-litigation claims or lawsuits in tort, was closely parallel to that of this suit: the tires were not safe and Firestone should be held accountable for that fact. Moreover, Firestone secretly settled with State Farm all claims for insurance in exchange for lack of disclosure by State Farm and avoided through a secrecy agreement with the Venezuelan government any disclosure of its having added nylon layers to ATX tires in Venezuela. The evidence of these secret settlements gets at the same notion as does the *Helwig* factor instructing courts to analyze whether there have been ancillary lawsuits filed charging fraud followed by quick settlement of such suits. The apparent animating idea is that a company engaging in such practices is, all things being equal, more likely than not aware of the improper nature of the practice being alleged, or at least of the perception of the given problem, which puts it on notice and, is fair to say, generates a duty to inquire. These settlements are thus appropriate to weigh in our scienter analysis, since "this court has made clear that 'the label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states.'" *Minger v. Green*, 239 F.3d 793, 799 (6th

Cir. 2001) (quoting *United States v. Louisville & Nashville R. Co.*, 221 F.2d 698, 701 (6th Cir. 1955)). Thus, in substance, if not form, we think a sixth of the nine factors is also present.

Given all this, we conclude under the totality of the circumstances that "the facts argued collectively . . . give rise to a strong inference of at least recklessness." *PR Diamonds*, 364 F.3d at 683. The Retirement Fund has therefore adequately pleaded scienter with respect to its claim against Firestone for the Firestone's August 1, 2000 statement.[29]

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[29] We do not foreclose the possibility that, going forward, Firestone may be held liable for Bridgestone's misrepresentations to the extent the Retirement Fund can prove Firestone communicated misleading results to Bridgestone. The requirement that the plaintiff allege that the defendant made a misrepresentation does not mean that the plaintiff must allege that the defendant communicated that misrepresentation directly to the plaintiff. *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398, 407 (S.D.N.Y. 1998); *see, e.g., Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997) (defendant '"cannot escape liability simply because it carried out its alleged fraud through the public statements of third parties'") (quoting *Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996)); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) ("There is no requirement that the alleged violator directly communicate misrepresentations to plaintiffs for primary liability to attach."). If the Retirement Fund can show that Firestone was the originator of Bridgestone's misrepresentations regarding Firestone and that Firestone knew or should have known that its misrepresentation would be communicated to investors, primary liability should attach. *See Anixter*, 77 F.3d at 1226. We need not assess here the factual question of whether Firestone was the original of Bridgestone's misrepresentations regarding Firestone and that Firestone knew or should have known that the misrepresentation would be communicated to investors.

b. Scienter as to Bridgestone

We next analyze whether the Complaint adequately pled scienter against Bridgestone for the two actionable representations in the 1999 Annual Report discussed above in Part II(C)(i)(a): (1) the "No Impairment" representation–that no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions and (2) the "No Loss" representation–that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires. A brief word is in order, though, on the nature of these claims. Contrary to Bridgestone's characterizations, the Retirement Fund's theory is not that the Complaint relies on the violation of GAAP to prove scienter. As Bridgestone correctly points, that allegation, without more, would not be sufficient to plead scienter adequately. *See, e.g., Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 432 (6th Cir. 1980) (concluding that although "there is sufficient evidence to support the Court's finding that [the defendant] inadequately tested . . . financial figures in certain respects, [] the evidence falls far short of proving that [the defendant] intended to deceive the stockholders."). Rather, GAAP is only part of the Complaint's explanation of the falsity of the claim: as discussed below, the Complaint alleges a wide range of facts above and beyond the violation of GAAP on which a reasonable juror could conclude scienter was proven. That brief detour aside, we turn to the two statements.

I. Bridgestone's Scienter as to Its "No Impairment" Representation

As to Bridgestone's scienter with respect to the "No Impairment" representation, we conclude that "the most

plausible of competing inferences" arising from the evidence is that Bridgestone was at least reckless as to the falsity of that representation. *Helwig*, 251 F.3d at 553. The analysis on this claim breaks down similarly to that for Firestone: four--arguably five--of the *Helwig* factors are present.

First, and in this case most significantly, the Complaint pleads facts that, if proven, could show a divergence between internal reports and external statements on the same subject. By the end of 1999, consumers had filed fifty lawsuits based on alleged problems with the ATX tires against Bridgestone or Firestone or both, thirty-four of them filed between 1997 and 1999. As former Firestone Vice-President of Quality Assurance Robert Martin testified in his deposition, Ono, who was Bridgestone's Executive Vice-President in addition to his role as Firestone CEO, was a member of the working group that from 1997 to 1999 tracked the lawsuits' status. An 1999 internal Firestone document included data that one of the ATX tire models--the ATX II--was the basis of the majority of the claims against Firestone but only ten percent of its production. A reasonable juror could conclude that this was a red flag as to problems with the tire model. Similarly, the ATX Wilderness model experienced in 1999 a rise in claims for tire tread separations of 194% over the previous year, another potential red flag. Thus, the facts known or available to Bridgestone were seemingly in tension with the representation that no impairment risk of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions and that there was no contingency risk of such a loss. Consider also Firestone's previous tire tread problems, fine, and massive recall, with which it is reasonable to assume, given due diligence standards, that Bridgestone, as its suitor in a multi-billion dollar purchase the previous decade, was aware. This history was in the known corporate background and

should have made Bridgestone more attuned to the likelihood, or at least non-trivial, contingent possibility, of a major financial hit to Firestone as the lawsuits, settlements, and regulatory and public scrutiny surrounding the Firestone ATX tires, as used on the Explorer, intensified from 1996 to 1999. This is particularly so given that the Americas were Bridgestone's largest sales market, that the North American market was, according to Bridgestone's Annual Reports, a major source of past and presumed future growth, that Firestone was the primary engine fueling that growth, and that the Explorer contract in particular was - by all appearances - a key to Firestone's return to profitability.

Three, arguably four, other factors are further probative of Bridgestone's scienter, albeit with less force than the first one. First, for the reasons just outlined, we conclude that the facts could show that Bridgestone disregarded "the most current factual information before making statements." *Helwig*, 251 F.3d at 552. Second, the 1999 Annual Report, by combining its statement of accounting policy with its silence, can be viewed as "disclosure of accounting information in such a way that its negative implications could only be understood by someone with a high degree of sophistication." *Id.* Third, for the reasons discussed above with respect to Firestone, the evidence supports a finding of "self-interested motivation of defendants in the form of saving their salaries or jobs." *Id.* Fourth, for the reasons discussed in the context of Firestone but also applicable to Bridgestone, the existence of ancillary claims by consumers and State Farm Insurance, lawsuits, and settlements based on claims alleging harm from unsafe ATX tires, and Firestone's quick and secret settlements of such claims, arguably is also probative of Bridgestone's recklessness as to the truth of its "No Impairment" representation.

The four other *Helwig* factors admittedly are not probative of scienter. As to the "closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information," Bridgestone's statement in March 2000 occurred over four months before the information accompanying the safety recall was disclosed, too distant in time to draw an adverse inference. And, as discussed in the Firestone context, the Complaint does not allege insider trading at a suspicious time or in an unusual amount, evidence of bribery by a top company official, or the personal interest of certain directors in not informing disinterested directors of an impending sale of stock.

Nonetheless, considering the totality of the circumstances, in particular the divergence of internal and external statements with respect to clearly material information going to one of Bridgestone's major flagship brands, "the facts argued collectively . . . give rise to a strong inference of at least recklessness" as to the truth of its "No Impairment" representation. *PR Diamonds*, 364 F.3d at 691.[30] The Retirement Fund has therefore adequately pleaded scienter with respect to its claim against Bridgestone for that representation.

ii. Bridgestone's Scienter as to Its "No Loss" Representation

We turn now to analyze whether the facts as pleaded give rise to a strong inference of recklessness by Bridgestone as to

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[30] *Cf. In re Ford*, 381 F.3d at 572 (noting, in affirming the dismissal of securities fraud claims against Ford arising out of facts common to this case, that "it would be reasonable to expect the cost of replacing any tires would be on Bridgestone").

its representation in the 1999 Annual Report that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires. Again, we think the key factor here is the "divergence between internal reports and external statements on the same subject." *Helwig*, 251 F.3d at 552. As discussed, Ono, Bridgestone's Executive Vice-President, met at least quarterly with Firestone's senior management group from 1997 to 1999, the financial group, the quality group, and the public relations / marketing department and in those meetings discussed the tread-peeling claims lodged against Bridgestone (as well as against Firestone). Assuming the truth of the Complaint's allegations, these discussions addressed the lawsuits, claim settlements, and informal complaints that led to investigations by governmental authorities in Arizona, Venezuela, and Saudi Arabia, as well as the secret settlements with State Farm under which Firestone reimbursed State Farm for accidents allegedly caused by ATX tire failures. Ono's awareness of the claims as gleaned from these meetings is directly attributable to Bridgestone[31] because "knowledge of a corporate officer or agent acting within the scope of his authority is attributable to the corporation." 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 12.8[4], at 444 (4th ed. 2002); *cf. Adams v. Kinder-Morgan*, 340 F.3d at 1106 ("the scienter of the senior controlling officers of a corporation may be attributed to the corporation itself to establish liability as a primary violator of § 10(b) and Rule 10b-5 when those senior

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[31] The Retirement Fund makes no serious argument that Bridgestone can be held liable for Firestone's August 1, 2000 statement; we therefore do not address that argument. We note though that generally a subsidiary's fraud cannot be automatically imputed to its corporate parent. *See In re Comshare*, 183 F.3d at 554.

officials were acting within the scope of their apparent authority.").

Two facts reinforce the notion that Bridgestone knew or should have known that it was taking heavy losses via claims settlement resulting from alleged problems with the ATX tires. First, Bridgestone should have been particularly attuned to the possibility of defect-caused problems from ATX tires manufactured at the Decatur plant in light of its awareness of the strike and the round-the-clock production schedule and the "implemented adjustments in working hours that permit our plants to operate 24 hours a day, seven days a week" that Bridgestone's 1996 Annual Report trumpeted, showing that it was clearly aware of the situation. Second, a 1999 internal Firestone report shows that the ATX II model was accounting for a quite disproportionate percentage of claims alleging tire failure relative to its production quantity as a Firestone's total tire output: over 50% versus 10%.

There is, as with the other two actionable statements and for the reasons previously stated, evidence of the existence of ancillary lawsuits and Firestone's quick settlement of those suits, of disregard of the most current factual information before making statements, of disclosure of accounting information in such a way that its negative implications could only be understood by someone with a high degree of sophistication, and of the self-interested motivation of defendants in the form of saving their salaries or jobs. Also like the analysis of the "No Impairment" representation, there is a lack of probative evidence as to the remaining *Helwig* factors.

Again, given this totality of circumstances, "the facts argued collectively . . . give rise to a strong inference of at least recklessness" by Bridgestone as to the truth of its "no

loss" representation. *PR Diamonds*, 364 F.3d at 683. The Retirement Fund has therefore also adequately pled scienter with respect to its claim against Bridgestone for this representation.

c. Scienter as to Ono

The Complaint attributes to Ono, as an individual corporate officer of Firestone and Bridgestone, all of the alleged misrepresentations of those two corporate defendants. The Retirement Fund seeks to attach liability to Ono based on his status as Firestone CEO and Bridgestone Executive Vice-President when those two companies issued the alleged misrepresentations. The Retirement Fund argues that "Ono is Liable for Firestone's and Bridgestone's statements under the group-published doctrine and inference," also known as the "group-pleading" doctrine. Appellant's Br. at 48. The district court dismissed the claim against Ono for failure to plead scienter. Albeit for different reasons, we agree that the claim against Ono should have been dismissed.

At least two circuits have specifically recognized a "group pleading" exception to the pleading-with-particularity requirements of Federal Rule Civil Procedure 9(b). *See Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1440 (9th Cir. 1987); *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1254 (10th Cir. 1997). That exception is premised on the assumption that "in cases of corporate fraud where the false or misleading information is conveyed in prospectuses, registration statements, annual reports, press releases, or other 'group-published information,' it is reasonable to presume that these are the collective actions of the officers." *Wool*, 818 F.2d at 1440.

Firestone argues that this doctrine runs afoul of the amended pleading requirements embodied in the Reform Act, which requires, for adequate pleading of scienter, that a federal securities fraud complaint state the relevant facts "with particularity." 15 U.S.C. § 78u-4(b). The United States Court of Appeals for the Fifth Circuit and a number of district courts have held that the group-pleading doctrine is foreclosed by the Reform Act.[32] Generally without discussion of the effect of the Reform Act, the several circuits that embraced the group-pleading doctrine prior to the passage of the Reform Act have continued to apply that doctrine since the Reform Act's enactment. *See Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061-63 (9th Cir. 2000); *Schwartz*, 124 F.3d at 1254. This court has not taken a position on whether such an exception exists. Courts are divided on this issue.[33]

We need not decide here the current viability of the group-published doctrine because resolution of that question is not required to decide this case. The Complaint pleads,

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[32] *See Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 364 (5th Cir. 2004) (collecting cases).

[33] *Compare, e.g., In re SmarTalk Teleservices, Inc. Sec. Litig.*, 124 F. Supp. 2d 527, 545 (S.D. Ohio 2000); *In re Raytheon Sec. Litig.*, 157 F. Supp. 2d 131, 152-53 (D. Mass. 2001); *In re Baan*, 103 F. Supp. 2d 1, 17 (D.D.C. 2000);*In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1340-41 (S.D. Fla. 1999); *In re Stratosphere Corp. Sec. Litig.*, 1 F. Supp. 2d 1096, 1108 (D. Nev. 1998) (holding that the group pleading doctrine survived the enactment of the Reform Act), *with In re Miller Indus., Inc. Sec. Litig.*, 12 F. Supp. 2d 1323, 1329 (N.D. Ga. 1998); *Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1350 (S.D. Cal. 1998) (holding that the Reform Act abolished the group pleading doctrine).

regarding Ono, little more than his corporate titles, dates of employment and resignation, and attendance at the quarterly meetings. The Retirement Fund does not allege by direct allegation or even upon information and belief that Ono played any role in drafting, reviewing, or approving the Firestone's "objective data" representation or the Bridgestone annual reports, 1999 or any other years. Nor does it allege that he was, as a matter of practice, or by job description, typically involved in the creation of such documents. Even if we permit the group-pleading inference, these alleged facts, without more, are not enough to attribute the alleged misstatements to Ono. *See, e.g., Johnson v. Tellabs, Inc.*, 262 F. Supp. 2d 937, 946-47 (N.D. Ill. 2003) ("Even if the group pleading doctrine survives the [Reform Act], ... [a] plaintiff is . . . required at least to include allegations . . . relating to an individual defendant's duties . . . that create a presumption that the company's statement was somehow . . . attributable to an individual defendant. Simply alleging an individual defendant's title is not enough."); *In re Baan Co.*, 103 F. Supp. 2d at 18 (noting that to satisfy the group-pleading doctrine, a complaint "must identify the roles of the individual defendants, and describe their involvement, if any, in preparing the misleading statements"). Accordingly, we conclude that the district court did not err in dismissing the claims in the Complaint against Ono.[34]

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[34] At first glance, it might seem incongruous to reach this conclusion after relying in part on Ono's knowledge of the claims settlements as a basis for Bridgestone's scienter on that claim. However, while an individual officer's knowledge may be attributed to the corporation, liability for the corporation's act does not, absent independent evidence, generally flow from the corporation to the corporate officer.

III. CONCLUSION

To summarize, we hold that: (1) the district court did not err in granting Kaizaki's motion to dismiss for lack of personal jurisdiction; (2) because the Complaint, for Firestone's August 1,2000 statement that "we continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires," adequately alleges an actionable statement and scienter against Firestone, the district court erred in dismissing the claim based on that statement; (3) the district court did not err in dismissing the claims against Firestone for its numerous other statements because those statements were not material; (4) the district court erred in dismissing the claims against Bridgestone based on two of its effective representations in the 1999 Annual Report--(i) that no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions, and (ii) that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires--because for those representations, the Complaint adequately pled an actionable statement and scienter against Bridgestone; (5) the district court did not err in dismissing the claims based on Bridgestone's representations in the financial statements of the 1996-1998 Annual Reports because those statements were not misrepresentations; and (6) the district court did not err in dismissing the claims against Ono. We therefore need not reach any of the district court's additional rulings.[35]

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[35] In connection with the defendants' motions to dismiss, the district court issued two rulings in addition to those discussed in the opinion, neither of which we need to analyze. First, the district court denied Bridgestone's motion to dismiss for lack of personal jurisdiction. *See* App. at 987-97 (Dist. Ct. Mem.). Because

To withstand the 12(b)(6) motions by Bridgestone and Firestone, the Retirement Fund must for each alleged misrepresentation have adequately alleged five elements: (1) a misrepresentation or omission; (2) of a material fact that the defendant had a duty to disclose; (3) made with scienter; (4) justifiably relied on by plaintiffs; and (5) proximately causing them injury. In addition to dismissing the claim against Kaizaki for lack of personal jurisdiction, the district court in its 12(b)(6) analysis held that the Complaint did not satisfy the first three elements as against Bridgestone, Firestone, and Ono, holdings as to which, as just summarized, we reverse with respect to Bridgestone and Firestone and affirm as to Ono. The district court did not address the final two of the

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Bridgestone does not cross-appeal, we do not address this aspect of the district court's ruling. *See Spann v. Colonial Village, Inc.*, 283 U.S. App. D.C. 216, 899 F.2d 24, 35 (D.C. Cir. 1990) (Ginsburg, R.B., J.) (noting that objections to "personal jurisdiction . . . can be waived at any stage of a proceeding and ordinarily are waived by failure to take a cross-appeal") (citing *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 n.11, 44 S. Ct. 560, 68 L. Ed. 1087 (1924)). Second, although the district court did not enter a Judgment in concert with its September 30, 2002 Order granting the several motions to dismiss, the Retirement Fund treated the district court's dismissal Order as a Judgment and, accordingly, on October 16, 2002, timely filed a motion pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend the Judgment or in the alternative for leave to file a Proposed Amended Consolidated Complaint, which the Retirement Fund attached to its Rule 59(e) motion, along with numerous proposed exhibits. *See* App. at 1039-1319. On February 25, 2003, the district court denied that motion on the grounds of undue delay and futility. *See id.* at 1446-58. Because we have resolved the appeal on the question of whether the district court's initial dismissal was correct, the question of whether the district court also erred in its denial of the motion for leave to amend is moot. We therefore do not address it.

five requisite elements: justifiable reliance and proximate cause. The parties' briefs did not address these elements on appeal. As a "'general rule . . . a federal appellate court does not consider an issue not passed upon below.'" *Pinney Dock & Transport Co.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)). We see no special reason to do so here. Consequently, we remand to the district court to consider whether the Complaint adequately pleads justifiable reliance and proximate cause with respect to the three actionable statements as against Bridgestone and Firestone, and for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-5505

[Filed October 22, 2004]

CITY OF MONROE EMPLOYEES RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated, Plaintiff-Appellant,	)
v.	)
BRIDGESTONE CORPORATION; BRIDGESTONE/FIRESTONE, INC.; YOICHIRO KAIZAKI; MASATOSHI ONO, Defendants-Appellees.	)

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 01-00017
Robert L. Echols, Chief District Judge

JUDGES: Before KEITH and CLAY, Circuit Judges; OBERDORFER, Senior District Judge.*

OPINION

OBERDORFER, Senior District Judge. In this appeal, we review the district court's dismissal with prejudice of a securities fraud class action Consolidated Complaint ("Complaint") filed by investors in Bridgestone Corporation ("Bridgestone") against Bridgestone, its subsidiary Bridgestone/Firestone, Inc. ("Firestone"), Bridgestone Chief Executive Officer ("CEO") Yoichiro Kaizaki, and Bridgestone Executive Vice President and Firestone CEO Masatoshi Ono. The district court dismissed the claims against Kaizaki for lack of personal jurisdiction and dismissed the claims against Bridgestone, Firestone and Ono for failure to state a claim upon which relief could be granted. For the reasons stated below, we affirm in part, reverse in part, and remand.

I. BACKGROUND

We assume the truth of the following facts for the purpose of this appeal. Unless otherwise indicated, they are drawn from the Complaint.

Bridgestone, a multi-national corporation with its international headquarters in Japan, is the world's largest tire manufacturer. Bridgestone's stock trades in Japan on the Tokyo Stock Exchange. Bridgestone's stock does not trade on any American stock exchange. Accordingly, Bridgestone is

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* The Honorable Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

not required to register its equity securities with the United States Securities & Exchange Commission ("SEC"). Bridgestone's stock trades in the United States on the over-the-counter, or "OTC," market. The OTC market is an American market for foreign-issued securities not traded on any domestic stock exchange.[1]

Bridgestone operates in the United States through its regional corporate headquarters in Nashville, Tennessee, and through its wholly owned subsidiary Firestone. Firestone's corporate headquarters are in Nashville. Firestone's largest tire production facility is in Decatur, Illinois.

From 1993 to 2001, Yoichiro Kaizaki was Bridgestone's President and CEO. In January 2001, he resigned from both positions. Kaizaki is now retired and resides in Japan. From 1993 to October 2000, Appellee Masatoshi Ono was the Executive Vice-President of Bridgestone and CEO of Firestone. In October 2000, Ono resigned from both positions.

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[1] *See* the National Association of Securities Dealers, Inc. ("NASD") website, <http://www.nasd.com/resources/glossary>. *See generally New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) ("a court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice."); Fed. R. Evid. 201 (providing that "[a] court may take judicial notice, whether requested or not" of a "judicially noticed fact" which "must be one not subject to reasonable dispute," a requirement satisfied if the fact is "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

Lead Class Plaintiff City of Monroe Employees Retirement System ("the Retirement Fund") is, like all class members, a purchaser of Bridgestone common stock or American Depository Receipts[2] for Bridgestone common stock between March 31, 1998 to August 31, 2000. The allegations in the Retirement Fund's Complaint relate to events dating back to 1978.

In that year, Firestone's "Firestone 500" tire was the leading steel-belted radial tire brand. In 1978 and 1979 combined, Firestone manufactured approximately 14,000 defective Firestone 500 tires, resulting in hundreds of passenger vehicle crashes and 41 fatalities. Initially, Firestone publicly attributed the known failures to consumers' failure to properly inflate or take care of their tires. Government investigators subsequently determined that Firestone had added too much of an adhesion-boosting compound to the rubber that held the steel belts together, resulting in rubber tire tread separating from underlying steel belts, eventually leading to the tires suddenly falling apart. As a result, in 1979, Firestone paid a $500,000 fine imposed by the National

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[2] An American Depository Receipt, or "ADR," represents ownership in a security issued by a foreign company in foreign markets. Typically, a United States depositary bank has custody of the security corresponding to an ADR and issues the ADR certificate to a United States investor. *See generally* Edward F. Greene, *et al.*, *U.S. Regulation of the International Securities and Derivatives Markets*, § 2.02 (2000); Fed. R. Evid. 201 (authorizing, and providing standards for, taking judicial notice). Each Bridgestone ADR represents ten shares of Bridgestone common stock. *See* Joint Appendix ("App.") at 140.

Highway Traffic Safety Administration ("NHTSA"),[3] the then-largest-ever fine imposed by the NHTSA, and instituted a recall from consumers of 13 million Firestone 500 tires. The recall injured Firestone's corporate image, brand, and financial performance. App. at 143 (Complaint).

In 1988,[4] Bridgestone acquired Firestone for $2.6 billion. Upon acquiring Firestone, Bridgestone sought to increase Firestone's revenue by expanding its contractual relationship with Ford Motor Company ("Ford"), a leading American automobile manufacturer.

In 1988 and 1989, Ford was developing the Explorer, a new sport-utility vehicle. Firestone sought to obtain the tire supply contract for the Explorer. Towards that end, Firestone, in 1989, submitted prototypes of its ATX tires to Ford for testing.[5] An outside company tested seventeen of the prototypes. In February 1989, the outside testing company reported that five of the seventeen prototypes had failed due to tread separation problems under heavy loads and strenuous conditions.

In March 1990, Ford introduced the new Explorer, equipped with Firestone ATX tires. Between 1990 and 1993, Ford sold over 300,000 Explorers per year. By 1993, Ford

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[3] The NHTSA is an agency within the United States Department of Transportation. *See generally* 49 U.S.C. § 301 *et seq.*

[4] The Complaint does not address the years 1980-1987.

[5] The Firestone ATX brands included the ATX, ATX II, and Wilderness AT Tires. App. at 144, 150, 154. Unless otherwise specified, we refer to these brands collectively as the "ATX" tires.

had become Firestone's leading customer as measured by sales volume and Firestone's financial health had improved markedly. Firestone had been losing approximately $1 million per day as of 1989-1990, prior to entering into the contract with Ford to outfit the Explorer with ATX tires; by 1993, Firestone was profitable.

Beginning in 1992, Firestone began receiving consumer complaints regarding tire tread defects, some of which led to "rollover" accidents in which the Explorer would flip over on to its side. Between 1992 and 1996, consumers filed 16 or more lawsuits against Bridgestone or Firestone for rollover accidents allegedly caused by ATX tire failures on the Explorer. Between 1993 and 1994, such suits based on problems with ATX tires increased from 13% of the claims filed against Firestone from problems in light truck tires to 43% of that category of claims. By 1999, at least 50 such suits had been filed.

The Complaint alleges that by 1994, under pressure to cut its costs and increase the productivity and production rates of its American manufacturing facilities, Firestone imposed longer hourly work shifts to permit around-the-clock, seven days-a-week operations. In July 1994, Firestone's labor force, which was unionized, responded by engaging in a massive production strike.

During the strike, Firestone continued production at its Decatur, Illinois manufacturing plant. To do so, Firestone staffed the manufacturing floor with "untrained and inexperienced non-union replacement workers," along with management employees. App. at 146. During the strike, the number of defective tires increased sharply "as supervisors and under-trained or untrained replacement workers were

called on to master highly skilled jobs to keep the Decatur plant running." *Id.* at 147.

In 1996, Firestone management, as part of the negotiations that ended the strike, extracted from the Firestone employees' union concessions under which production speed increased, including longer workshifts and retention of a seven-days-a-week production schedule. *Id.* at 147. In its 1996 Annual Report, Bridgestone proclaimed that "we reached an agreement in 1996 with the union that represents employees at several of our North American plants . . . The union has accepted already-implemented adjustments in working hours that permit our plants to operate 24 hours a day, seven days a week." *Id.* at 246. After the strike, the increased level of production errors persisted in tires made at Firestone's Decatur plant. The Complaint alleges that production and inspection shortcuts resulted in a sharp rise in the number of tires that were not properly manufactured, tested, or inspected.

In 1996, Firestone performed random quality control high-speed durability tests on various ATX tires. In one of the sample tests, Firestone examined 129 ATX tires made at the Decatur plant. Eighteen of those tires failed the test due to tire tread separation. In another random test of 229 ATX tires from the Decatur plant, 31 failed. In an additional random test of 18 ATX tires, eight failed, seven of which were from the Decatur plant. Internal Firestone documents show that the tires' tread separation rate was highest for tires produced at the Decatur plant from 1994 to 1996, during and just after the strike.

In addition to the alleged several thousand claims submitted by consumers directly to Firestone for compensation, between 1997 and 1999, United States

consumers filed 34 suits against Bridgestone or Firestone based on deaths or injuries allegedly caused by rollovers of Explorers equipped with Firestone ATX tires. By no later than 1997, senior Firestone officials, including Firestone CEO and Bridgestone Executive Vice-President Ono, were tracking the claims and lawsuits. Robert Martin, who was Firestone's Vice President of Quality Assurance from 1997 or earlier until his retirement in April 2000, testified in a deposition that senior Firestone executives, Ono included, met at least quarterly from 1997 through 1999. The meetings consisted of Firestone's senior management group, the financial group, the quality group, and the public relations/marketing department. Martin testified that those meetings included discussion of tread-peeling claims and lawsuits lodged against Firestone and Bridgestone.

Internal Firestone documents regarding property damage, injury claims, and tire performance data, such as warranty adjustments and financial analysis of such claims, show that starting in 1996, the ATX tires began to fail at higher rates than they had before. Similarly, a Firestone chart reveals that from 1998 to 1999, tread separations for the Wilderness AT, one of Firestone's ATX tire models, increased by 194%. According to a 1999 internal Bridgestone report, in 1997 and 1998, another Firestone tire model, the ATX II, accounted for the majority of the tire claims against Firestone but for less than 10% of Firestone's total tire production. The Complaint alleges that Firestone "had knowledge of thousands of claims for and complaints concerning ATX tire failures, especially ATX tires manufactured at [its] Decatur, Illinois plant during and after a bitter 1994-1996 strike, due to design and manufacturing defects which resulted in over 2,200 rollover accidents, over 700 serious injuries and approximately 174 fatalities by 2000." App. at 131 (Complaint). In response to the lawsuits, Firestone and Bridgestone entered into settlement

agreements under which the settlement agreements with plaintiffs were sealed, the parties entered into stipulated protective orders to conceal discovery, and Bridgestone or Firestone had returned to it "damaging documents." *Id.* at 151.

In 1996 and 1997, State Farm Insurance Company, the largest automobile insurer in the United States, demanded that Firestone pay the costs of automobile accidents attributable to ATX tire failures. Without conceding (or contesting) liability, Firestone reimbursed State Farm without public disclosure of the claims or the resulting payments. Having been paid, State Farm did not sue Firestone, lawsuits which the Complaint alleges "would have publicized the growing problem with the ATX tires." *Id.* at 150.

Firestone suppressed information pertaining to investigations by various governments, domestic and foreign. In 1996, Arizona state government agencies expressed concern about the Firestone ATX tires. Firestone sent a team of engineers to investigate and then replaced certain Explorer tires without any public disclosure of the investigation or the replacements.

In Venezuela, between 1990 and 1998, over forty people were killed in Explorer accidents allegedly due to ATX tire failures. Ford demanded that Firestone alter the design of its ATX tire being sold in Venezuela to include a nylon layer. Firestone initially did not do so. The Venezuelan government investigated and expressed concerns to Firestone about the ATX tires. According to a Venezuelan government document, Firestone agreed to add a nylon layer to the tires in exchange for the Venezuelan government's promise that it would not publicly disclose this act by Firestone. According to the Venezuelan government document, Firestone expressed a

belief that disclosure of the layer-adding "would put in jeopardy the Bridgestone brand in Venezuela." *Id.* at 152.

In Saudi Arabia, multiple people in Ford Explorers outfitted with Firestone ATX tires also died between 1990 and 1998 due, allegedly, to ATX tire failures. *Id.* at 152. Firestone's senior management team discussed the possibility of a formal recall of the ATX tires in the Persian Gulf region. Firestone ultimately decided not to initiate such a recall. *Id.* A March 1999 internal Ford memorandum stated, with respect to that decision, that "Firestone legal has some major reservations about the plan to notify customers and offer them an option . . . They feel that [the National Highway Traffic Safety Administration, or "NHTSA"] will have to be notified of the program, since the product is sold in the U.S." *Id.* at 153.

Regarding the ATX-related accident data from the United States, Venezuela, and Saudi Arabia, the Complaint alleges that Bridgestone and Firestone executives "kept the accident rate data which they had and which showed these serious problems from safety regulators." *Id.* at 151. The Complaint alleges that their motive for doing so was "so they could report huge profits and their executives could retain their positions of power, prestige and profit and Bridgestone's stock and ADRs would continue to trade at inflated, higher prices, providing the executives with direct economic benefits based on their stock holdings and options and allowing them to personally pocket huge bonuses based on corporate profits." *Id.* at 151-52.

The Complaint alleges a series of public, fraudulent statements by Bridgestone and Firestone, beginning in March

1997 when Bridgestone issued its 1996 Annual Report.[6] (Bridgestone typically issued its annual reports for each fiscal year in March or April of the subsequent year). The 1996 Annual Report stated, in its introductory "Word from the President" section:

> We are staking our claim to global leadership on the tire industry. . . . I am especially satisfied with our ongoing business turnaround in the Americas, the biggest tire market in the world
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> ***
>
> Our competitive edge in tire technology remains our highest asset . . . . Technology will continue to strengthen the appeal of our products and operations. This will include safety and improving performance.

App. at 245-47 (1996 Annual Report).

In March 1998 came Bridgestone's 1997 Annual Report. The accompanying letter stated: "We are making steady progress towards leadership in the world tire industry. . . . . Sales at our subsidiary for the Americas, [Firestone], surpassed our parent-company turnover for the first time."

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[6] The Complaint relies heavily on Bridgestone's Annual Reports for fiscal years 1996-2000. Bridgestone attached to its motions to dismiss before the district court copies of those documents. *See* App. at 241-476. Accordingly, we, like the district court, consider the full text of the 1996-2000 Annual Reports. *See Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997)("documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim.").

App. at 289 (1997 Annual Report). Similarly, Bridgestone's 1998 Annual Report, issued in April 1999, stated: "the Americas, the largest tire market in the world, are our biggest source of consolidated sales . . . Our global market share in original equipment tires increased further in 1998. That growth evidences high regard among automakers for our strengths in product quality." App. at 342 (1998 Annual Report).

In early February 2000, a Houston, Texas television station reported that passengers in three Explorers equipped with ATX tires had died after suffering rollover accidents. On February 4, 2000, Firestone issued a release stating: "We monitor the performance of all of our tires and . . . we have full confidence in them." App. at 167 (Complaint).

In March 2000, Bridgestone issued its 1999 Annual Report. It stated: "We are determined to assert a singular advantage in product technology. . . . We increased our market share in North America in 1999 in . . . the original equipment market. Our North American operations are approaching a market share of 20%." App. at 384 (1999 Annual Report). The Report included in its "Analysis of Financial Position" section a chart indicating that as a percentage of Bridgestone's total international net sales, its net sales in the Americas were 41.5 %,[7] followed by Japan at 40.8 %, Europe 10.6% and "Others" 7.1%. *See id.* at 403. In the "Americas" section, under the bold, purple-colored, large font heading of "Trends And Topics," the Report stated that "we increased our market share in North America in

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[7] Bridgestone's 1999 Annual Report did not break down the sales data between North and South America, nor as between dealers in individual countries in the Americas.

1999 . . . Demand for original equipment tires continued to grow in 1999 in the booming North American automobile market." *Id.* at 383-84. The Annual Report also stated that "our multi-brand strategy -- centered on the Bridgestone, Firestone, and Dayton[8] brands -- raised our market profile further in 1999," and that "aggressive product development and strategic marketing have re-established the Firestone name as a vigorous brand in premium-grade tires, as well as a large-volume, middle-market tires." *Id.* at 384. It continued: "Ford Motor Company is our oldest customer in North America . . . We also have become a major supplier to General Motors Corporation, which recently honored us with its Supplier of the Year Award for the fifth consecutive year. As a major supplier to leading European automakers, we have developed business with the North American operations of those automakers, too. We also supply tires to nearly all the Japanese-owned vehicle plants in North America." *Id.*

Each of the Annual Reports covering fiscal years 1996 to 1999 included financial statements with a category labeled "Contingent Liabilities." *See* App. at 278, 322, 367, & 417-18 (1996-1999 Annual Reports, respectively). None of those reports, though, made a mention or disclosure of any loss contingency related to any of Bridgestone or Firestone's tires products that had previously been sold or sent to dealers.

Each of the Annual Reports from 1996 to 1998 included a letter from Bridgestone's outside auditors Asahi and Company stating that the given Annual Report was prepared "in conformity with accounting principles generally accepted

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[8] Dayton was a Bridgestone brand marketed, in the words of the 1999 Annual Report, to consumers seeking "value-oriented tires." App. at 384.

in Japan applied on a consistent basis." App. at 280, 324, and 370 (1996-1998 Annual Reports, respectively). The 1999 Annual Report contained similar language, stating that the consolidated financial statements accompanying it were prepared "in conformity with accounting principles and practices generally accepted in Japan . . . applied on a consistent basis, except for changes, with which we concur, in the method of accounting for retirement and severance benefits and pension costs . . . and for goodwill, consolidation differences, and income taxes." App. at 422 (1999 Annual Report). The Complaint alleges that under International Accounting Standard § 9010.08-.09, applicable in Japan pursuant to the International Accounting Standards Committee, "loss contingencies should be recorded if it is probable that an asset has been impaired or a liability incurred at the balance sheet date and a reasonable estimate of the amount of the resulting loss can be made." App. at 178 (Complaint). Section 9010.08-09 provides further that "if either of the conditions is met and the possibility of the loss is not remote, the existence of the contingent loss should be disclosed in the financial statements." *Id.* The Complaint alleges that under this standard, Bridgestone's lack of recordings of a loss contingency in the financial statements accompanying the Annual Reports for fiscal years 1996 through 1999 related to the safety and legal problems with the Firestone ATX tires -- in particular a recall -- were each separately an actionable misrepresentation in violation of federal securities laws.

Generally Accepted Accounting Principles, or "GAAP," are a series of general principles followed by accountants in a given country or geographic area. Bridgestone's 1999 Annual Report stated that "the Japanese consolidated financial statements have been prepared in accordance with the provisions set forth in the . . . accounting principles and

practices generally accepted in Japan ('Japanese GAAP')." App. at 413 (1999 Annual Report). It represented that the "accompanying financial statements include the accounts of certain foreign subsidiaries, which are based upon U.S. GAAP, representing 45% of total consolidated assets and 51% of total consolidated revenues in 1999." *Id.* Bridgestone and Firestone do not dispute that this statement was a reference to, among other non-Japanese Bridgestone subsidiaries, Firestone. United States GAAP, as set forth in Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 5 ("FASB 5"), "requires that loss be accrued whenever it is probable a loss has been incurred or an asset impaired and the amount of the loss can be reasonably estimated" and that "if the loss is at least reasonably possible but no reasonable estimate can be made, the contingency at a minimum should be disclosed." App. at 178 (Complaint). The 1999 Annual Report stated that Japanese GAAP "are different in certain material respects (e.g. topics addressed, available alternatives, recognition criteria, measurement practices, presentation formats and disclosures, etc.), as compared to accounting and reporting standards generally accepted in the U.S. ('U.S. GAAP')." App. at 413 (1999 Annual Report). The Report included at note 11 "a supplemental discussion of the accounting differences." *Id.* Note 11 listed a number of "differences between Japanese and U.S. GAAP." *Id.* at 421. Note 11 did not include a reference to FASB 5 as one of the differences between U.S. and Japanese GAAP. *See id.* The Complaint alleges that under FASB 5, Bridgestone's failure to either accrue for a loss or disclose both the ongoing losses from claims due to settlement and the contingency of a recall or a major loss related to the impairment of the Firestone tires was an actionable misrepresentation.

In July 2000, after consumers filed two lawsuits against Firestone alleging that ATX tire tread separation caused Ford Explorers to roll over and cause fatalities, the Wall Street Journal asked Firestone to comment. A resulting July 26, 2000 Wall Street Journal article quoted a Firestone representative as stating that Firestone had "full confidence" in its tires. App. at 170-71 (Complaint). Also in July 2000, several safety groups urged Ford to recall all Explorers with Firestone ATX tires on them. On August 1,2000, Firestone issued a written statement that "we continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires." *Id.* at 170-71. In that release, Firestone further stated that "properly inflated and maintained Firestone ATX . . . tires are among the safest tires on the road today." *Id.* On August 3, 2000, the New York Times published an article about the Explorer and Firestone's ATX tires, suggesting problems with the tires. The article reported that "Firestone denied the charges . . . . 'These are safe tires,' said . . . a [Firestone] spokeswoman."

Id. at 171.[9] The Complaint alleges that these public statements by Firestone in July 2000 and August 2000 were misrepresentations in violation of federal securities laws.

On August 9, 2000, Firestone announced that effective that day, it was beginning a formal, voluntary safety recall. The recall included 6.5 million Firestone ATX tires on Explorers already sold and an offer to replace all Firestone

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[9] The New York Times article identified the name of the Firestone spokesperson. Because that person is not a defendant in this case, and because neither the quotation's accuracy nor the spokesperson's job description are disputed, we need not do so.

ATX tires on unsold Explorers in dealers' inventory at that time. The recall specifically designated ATX tires made at Firestone's Decatur plant.

In the months immediately following the recall, Firestone and Bridgestone suffered major upheaval. In October 2000, Ono resigned as Executive Vice President of Bridgestone and Chief Executive of Firestone. In January 2001, Kaizaki resigned as Bridgestone's President and Chief Executive Officer. Saudi Arabia banned the importation of ATX tires. The two companies' images were subjected to an array of public condemnation by regulators,[10] congressional

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[10] *See, e.g.*, Jennifer Hoyt, *Agency Seeks Broader Authority to Probe Vehicle Safety Breaches*, Houston Chronicle, Sept. 13, 2000, available on-line at 2000 WL 24511175 ("NHTSA Administrator Sue Bailey said she thought the problem was with tires, but that the agency was still investigating the vehicle-tire interaction."); Nedra Pickler, *Hearings Scheduled on Tire Case*, Associated Press, Sept. 14, 2000, available on-line at 2000 WL 26675534 ("The National Highway Traffic Safety Administration has said it is investigating 88 deaths and more than 250 injuries over the past decade involving Firestone tires. The Wall Street Journal reported Thursday that five more deaths have occurred since the recall of 6.5 million ATX, ATX-II and Wilderness AT tires was announced"); App. at 136 (quoting a statement made August 30, 2000 by Samuel Ruh Rios, President of Indecu, the Venezuelan safety agency, that Bridgestone and Ford had "met to plan ways out of a situation that was affecting their commercial interests, at the price of causing damage, destruction, and death. . . . . Both companies hid information and this caused many accidents"); *id.* at 172 (quoting an August 31, 2000 Reuters Report as stating that "Venezuela's consumer protection agency recommended . . . that criminal charges be filed against Bridgestone Corp. . . . over defects linked to at least 46 deaths in Venezuelan road accidents"). We take judicial notice of the fact that

representatives from both major American political parties,[11] and industry analysts.[12]

Most significant was the apparent financial impact of the recall. Firestone experienced a net $510 million loss for the 2000 fiscal year and Bridgestone' total profits decreased from

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the media articles cited above by reference to electronic databases were published, and not necessarily as to the truth of their contents. *See generally* Fed. R. Evid. 201.

[11] *See, e.g.*, Hoyt, *Agency Seeks Broader Authority*, at 2000 WL 24511175 ("Sens. Dianne Feinstein . . . and Herb Kohl []announced that they would introduce a bill to increase civil penalties for withholding information from NHTSA. Their bill also would set criminal penalties for companies that knowingly allow defective vehicles or parts to be distributed if death or injury results."); App. at 172-73 (Complaint, quoting statement by United States Representative Heather Wilson, in response to claims by senior Firestone executives of lack of knowledge of fatal defects of the ATX tires: "'That's rubbish . . . You knew a long time ago.'"); *id.* at 173 (quoting Representative Billy Tauzin as stating through his spokesman, after a congressional hearing on the rollover accidents: "'This latest information only confirms our suspicion that [Bridgestone and Firestone] knew a hell of a lot more than they're willing to admit.'").

[12] *See, e.g.*, App. at 9 (Complaint, quoting David Meyers, Associate Professor of Management at Akron University, as stating "'I'm on record as saying that the Firestone brand name is toast . . . . That company's in trouble, and that's not news. I attended the congressional hearings at which company executives testified, and those people aren't believable. I wouldn't trust them with my kids['] piggy bank'") (internal parentheses omitted); *id.* (quoting Columbia University Law School Dean and Professor David Leebron as stating, on January 21, 2001: "'This is Firestone's Pinto.'").

about $764 million in 1999 to about $153 million in 2000. Between August 8, the day before the recall, and September 21, 2000, Bridgestone's common stock share price on the Tokyo stock exchange dropped from over $2,200.00 to less than $1,400.00. Between those same dates, its ADR share price dropped from over $202.00 to less than $122.00. Bridgestone's earnings for fiscal year 2000 were its lowest in a decade. In the 2000 Annual Report, then-newly installed Bridgestone CEO Shigeo Watanabe stated that "net earnings declined 80% in the past year . . . That decline is attributable mainly to a special charge in connection with the tire recall in the United States. We have recorded a charge at [Firestone] of $754 million [] for costs already incurred in replacing the recalled tires and for potential liabilities and other legal costs in connection with the problems that led to the tire recall. . . . Fallout from the recall will remain a marketing issue for us in North America and elsewhere in 2001." *Id.* at 432 (2000 Annual Report).[13]

In the wake of the recall, Firestone immediately launched a four-month internal investigation culminating in a report released publicly in December 2000. *See* App. at 174 (Complaint). The report found that two problems were central to the ATX tires' repeated failures. First was a problem with

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[13] The recall's public policy impact has been evident as well. The public controversy surrounding the safety issues that led to the recall has in important ways influenced the policy debate in the four years since the recall. *See, e.g.*, Danny Hakim, *U.S. Regulators Release Vehicle Rollover Data*, N.Y. Times, Aug. 10, 2004, available on-line at <http://www.nytimes.com> ("The government rollover tests began this year at the direction of Congress, which ordered the agency to develop a track test in the wake of a series of fatal rollover crashes in the late 1990's involving Ford Explorers equipped with Firestone tires.").

the tires' "shoulder pocket," an area from the sidewall to the tread designed to give traction in snow and off-road driving conditions. In many of the ATX tires, the shoulder pocket was made with an angle steeper than is proper such that the pocket cracked on the inside. Particularly in those tires produced at the Decatur plant, the cracking was prone to spread from the pocket to the point where two belts of rubber-coated steel fibers form the tires' core. *Id.* Second, noted the report, the materials used at the Decatur plant produced tires less likely to stay intact. To make a tire, the various layers are heated and squeezed together by fusion. The Decatur plant produced rubber pellets while the other plants used rubber sheets. In each case, the pellets or sheets were sprayed with lubricant to keep the rubber from sticking together in large globules. Lubricant makes tires stick together less. Because the pellets had a larger surface area than the sheets, the pellets in the Decatur plant were exposed to two or three times more lubricant than the sheets from other plants. After Firestone's internal report was issued, Firestone began shipping rubber sheets from other plants to the Decatur plant to avoid this problem. *Id.*

On May 11, 2001, the Retirement Fund (as lead named plaintiff for the Class) filed the instant Consolidated Class Action Complaint in the United States District Court for the Middle District of Tennessee alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78j(b), and Securities Exchange Commission Rule 10b-5, codified at 17 C.F.R. § 240.[14] *See* App. at 130-

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[14] On January 4, 2001, the Retirement Fund filed a class action against the now defendant-appellees in the United States District Court for the Middle District of Tennessee, alleging securities fraud. On January 22, 2001, plaintiff Patricia Ziemer filed a similar Complaint in that same court against the same

186. The four defendants -- Bridgestone, Firestone, Kaizaki, and Ono -- moved to dismiss the Complaint on a variety of grounds. *See* App. at 191-526.

On September 30, 2002, the district court issued a lengthy memorandum opinion and accompanying order dismissing the Complaint. *See* App. at 975-1038. Two of the district court's rulings are relevant in this appeal, each of which we describe in further detail within our analysis in Part II. First, the district court granted Kaizaki's motion to dismiss for lack of jurisdiction. Second, the district court granted -- as to the remaining three defendants, Bridgestone, Firestone, and Ono -- their motions to dismiss with prejudice all counts for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

The Retirement Fund appeals.

II. DISCUSSION

Overview

On appeal, our analysis proceeds in three parts, Parts II(A)-I(C). Part II(A) articulates the applicable standards of review. Part II(B) assesses whether the district court erred in granting Kaizaki's motion to dismiss for lack of personal jurisdiction and concludes that it did not err in so doing. Part II(C) addresses the merits and divides into two sections. Part II(C)(1) discusses whether the Complaint adequately pleaded any actionable statements and concludes, contrary to the district court, that one statement by Firestone and two

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defendants. On April 11, 2001, the district court consolidated the two actions into the instant case.

statements by Bridgestone were actionable but, like the district court, that the remaining alleged statements in the Complaint were not actionable. Part II(C)(2) analyzes whether, for those three actionable statements, the Complaint adequately pled scienter as against Bridgestone, Firestone and Ono. It concludes that the Complaint did so for at least one statement with respect to each of the two corporate defendants, but did not do so with respect to Ono.

A. Standards of Review

We review *de novo* the district court's dismissal of the counts against Kaizaki for lack of personal jurisdiction. *See Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co., Ltd*, 91 F.3d 790, 793 (6th Cir. 1996). We also review *de novo* the district court's dismissal of the securities fraud complaint against Bridgestone, Firestone, and Ono for failure to state a claim upon which relief can be granted. *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 680, 91 Fed. Appx. 418 (6th Cir. 2004). In performing that review, we, like the district court, "must accept as true 'well-pleaded facts' set forth in the complaint." *Id.* (quoting *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)). The Retirement Fund "need only give a 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Rule 12(b)(6) allows a dismissal for failure to state a claim only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Id.* "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." *Lawler*, 898 F.2d at 1199 (quoting *Neitzke v. Williams*, 490 U.S. 319, 328 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)). Construing the Complaint in a light

most favorable to the Retirement Fund, we must determine whether it "undoubtedly can prove no set of facts in support of its claims that would entitle [it] to relief." *PR Diamonds*, 364 F.3d at 680. That said, we do not accept as true "the bare assertion of legal conclusions," *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) (internal quotation omitted), nor do we "accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Morgan*, 829 F.2d at 12). Further, we may affirm the district court on any ground supported by the record. *Hoffman v. Comshare, Inc. (In re Comshare Inc. Sec. Litig.)*, 183 F.3d 542, 547-48 (6th Cir. 1999).

B. Personal Jurisdiction

The Due Process Clause of the United States Constitution "permits the exercise of both general and specific jurisdiction." *Aristech Chem. Int'l Ltd. v. Acrylic Fabricators, Ltd.*, 138 F.3d 624, 627 (6th Cir. 1998). "General jurisdiction exists when a defendant has continuous and systematic contacts with the forum state sufficient to justify the state's exercise of judicial power with respect to any and all claims." *Id.* (internal quotation marks omitted). Kaizaki lives today in Japan and at all relevant times lived and worked in Japan. The Retirement Fund does not argue that the district court could assert general jurisdiction over him. Rather, it argues that the district court should have exercised specific jurisdiction over him, which, in contrast, "subjects the defendant to 'suit in the forum state only on claims that 'arise out of or relate to' a defendant's contacts with the forum.'" *Id.* (quoting *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868 & n.8, 80 L. Ed. 2d 404, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)).

Whether specific jurisdiction exists over Kaizaki depends on three criteria. *Aristech*, 138 F.3d at 627. First, he must have purposefully availed himself of the privilege of acting in the United States or have purposefully caused a consequence in the United States. *Id.* Second, the cause of action must arise from his actions in the United States. *Id.* Finally, the exercise of jurisdiction by a court within the United States[15] over Kaizaki must be reasonable under the circumstances of this case. *Id.* at 628. The district court held that the Retirement Fund's Complaint failed all three prongs. *See* App. at 997-1002. We must affirm the district court's holding if we conclude that any one of the three prongs are not satisfied. *See, e.g., Lak, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1303 (6th Cir. 1989) ("Each . . . criterion represents an independent requirement, and failure to meet *any* of the three means that personal jurisdiction *may not* be invoked.") (emphasis supplied).

Upon review, we conclude, under the circumstances of this case, that the third, "reasonableness" prong tips against exercising jurisdiction against Kaizaki. Whether the exercise of jurisdiction over a foreign defendant is reasonable is a function of balancing three factors: "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Asahi Metal Industry Co., Ltd.*,

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[15] The Securities Exchange Act includes a nationwide service-of-process provision. *See* 15 U.S.C. § 78aa. Therefore, the "forum" for the purposes of personal jurisdiction analysis in the Kazaiki's context is the United States, rather than any particular federal judicial district within the United States. *See United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (holding that 15 U.S.C. § 78aa "confers personal jurisdiction over any defendant with minimum contacts to the United States").

v. Superior Ct. of Cal., 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

Applying that balancing test to this case, there is clearly potential, should this suit go forward, for some substantial burden on Kaizaki. The Supreme Court has "cautioned that '*great care and reserve* should be exercised when extending our notions of personal jurisdiction into the international field.'" *Id.* (quoting *Asahi*, 480 U.S. at 115) (citation omitted and emphasis supplied), and that "the burden of mounting a defense in a foreign legal system is 'unique' and should be afforded 'significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.'" *Aristech*, 138 F.3d at 628 (quoting *Asahi*, 480 U.S. at 114). In performing this balancing of interests, we keep an eye towards "the interstate judicial system's interest" in judicial economy and "in furthering fundamental social policies." *Asahi*, 480 U.S. at 113. In *Aristech*, decided in 1998, this Court upheld the reasonableness of exercising jurisdiction over a Canadian executive by reasoning, in part, that "a Canadian defendant . . . bears a substantially lighter burden than does a *Japanese* defendant--or for that matter, most other foreign defendants," since "only a short plane flight separates Ontario from Kentucky." 138 F.3d at 628 (emphasis supplied). "This is not a case," *Aristech* noted, "where the exercise of jurisdiction requires a company to travel from the other side of the world or even across the [ocean]." *Id.* (internal ellipses and citations omitted). In contrast, of course, Kaizaki *is* living in Japan, and is a retired senior citizen at that. Though, presumably, a deposition or other proceedings involving Kaizaki's participation could be conducted by telephone or by counsel in Japan, circumstances might necessitate his traveling to the United States for atrial or other litigation-related purpose.

Turning to the other side of the scale, the countervailing interests of the United States as the forum and the class plaintiffs in the instant suit being prosecuted against Kaizaki are relatively light. The key defendants, we think, are Bridgestone and Firestone, the two corporate entities with substantial ongoing business affairs in the United States. The court's personal jurisdiction over the corporate defendants, and indeed over defendant Ono, is conceded.[16] Thus, the marginal addition of Kaizaki would add little or nothing to the potential recovery should the plaintiffs ultimately prevail on the merits and be awarded damages, for which Kaizaki would be at most "liable jointly and severally," but not separately liable. 15 U.S.C. § 78t(a). We thus agree with the district court's conclusion that "because Bridgestone, Firestone and Ono are subject to jurisdiction, no actual violation of securities laws would go unpunished, and any recovery is highly unlikely to be affected by Kaizaki's dismissal." App. at 1001. Though the United States and the class plaintiffs of course have an interest in the enforcement of federal securities laws, those interests as against Kaizaki are tempered in the circumstances of this case. We find no error in the district court's conclusion that exercise of jurisdiction over Kaizaki in the circumstances of *this* case was not reasonable. Thus, even assuming, without deciding, that the first two prongs of the three-part specific jurisdiction test are satisfied, the district court did not err in granting Kaizaki's motion to dismiss for want of personal jurisdiction on the grounds that the third "reasonableness" prong was not satisfied.

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[16] Bridgestone did not cross-appeal the denial of its motion to dismiss for lack of personal jurisdiction. Neither Ono or Firestone have contested personal jurisdiction.

The Retirement Fund suggests that even if we conclude that the circumstances of this case do not satisfy the test for personal jurisdiction over foreign defendants, its "allegations of control person liability" nonetheless "provide personal jurisdiction over Kaizaki." Aplt's Br. at 53. The notion of a control person derives from § 20(a) of the Securities Exchange Act, which attaches liability to "every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t(a). The term "control" in this context is defined by the code of federal regulations as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405(f).

There is a division of judicial authority as to whether showing that a defendant is a controlling person within the meaning of these provisions (and thereby potentially liable under the securities law to the same extent as the controlled entity) is automatically sufficient to bring that defendant within the personal jurisdiction of the court merely because the controlled entity itself has the requisite jurisdictional contacts. *See, e.g., In re Baan Co. Sec. Litig.*, 245 F. Supp. 2d 117, 128-29 (D.D.C. 2003) (collecting cases). This court has not apparently addressed the issue.

The Retirement Fund's theory is supported most prominently by *San Mateo County Transit Dist. v. Dearman, Fitzgerald, & Roberts, Inc.*, 979 F.2d 1356 (9th Cir. 1992). That decision held that jurisdiction is appropriate if the plaintiff makes only "a non-frivolous allegation that the

defendant controlled a person liable for the fraud." *Id.* at 1358. *See also McNamara v. Bre-X Minerals Ltd.*, 46 F. Supp. 2d 628, 636-37 (E.D. Tex. 1999) (adopting a rule that "the Court has personal jurisdiction over any Defendant as to which the Plaintiffs make a prima facie showing of control person liability."). Kaizaki responds that "[a] claim of statutory liability . . . is no substitute for establishing personal jurisdiction." Aple Bridgestone and Kaizaki's Br. at 46 n.18 and accompanying text. We agree. "Liability is not to be conflated with amenability to suit in a particular forum. Personal jurisdiction has constitutional dimensions, and regardless of policy goals, Congress cannot override the due process clause, the source of protection for non-resident defendants." *AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590-591 (9th Cir. 1996) (internal citations omitted). The broad understanding of control person liability adopted by the securities laws cannot on its own support personal jurisdiction. This approach would, as one persuasive opinion stated, "impermissibly conflate[] statutory liability with the Constitution's command that the exercise of personal jurisdiction must be fundamentally fair." *In re Baan*, 245 F. Supp. 2d at 129 (Huvelle, J.). Though they may involve a similar contact-based analysis, ultimately, the two inquiries must be distinct: "control person liability under the securities laws . . . is not germane to the issue of personal jurisdiction." *Federal Deposit Ins. Corp. v. Milken*, 781 F. Supp. 226, 234 (S.D.N.Y. 1991) (Pollak, J.).

We thus reject the Retirement Fund's invitation to substitute our analysis of the securities laws' substantive bases for liability for the required, due-process based personal jurisdiction analysis, and therefore decline to address Kaizaki's potential liability as a control person. For the foregoing reasons, we hold that the district court did not err in granting Kaizaki's motion to dismiss for want of personal

jurisdiction. We turn then to the merits of the Complaint and analyze whether the district court erred in granting the motion to dismiss as against the other three defendants on the grounds that it failed to state a claim upon which relief could be granted.

C. Merits

The "'fundamental purpose of modern federal securities laws is to substitute a philosophy of full disclosure for the philosophy of caveat emptor. " *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151, 31 L. Ed. 2d 741, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963)). Federal securities law thus prohibits "fraudulent, material misstatements or omissions in connection with the sale or purchase of a security." *Morse v. McWhorter*, 290 F.3d 795, 798 (6th Cir. 2002). The standards for stating a claim under Section 10(b) of the Securities Exchange Act of 1934 or under SEC Rule 10b-5 are the same: a plaintiff must allege five elements: (1) a misrepresentation or omission; (2) of a material fact that the defendant had a duty to disclose; (3) made with scienter; (4) justifiably relied on by plaintiffs; and (5) proximately causing them injury. *Helwig v. Vencor, Inc.*, 251 F.3d 540, 554 (6th Cir. 2001) (en banc)(citing *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1409 (6th Cir. 1991)); *see also Sofamor Danek*, 123 F.3d at 400.[17] A statement is said to be

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[17] The Complaint also alleges liability against Kaizaki and Ono under § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), which provides for liability of controlling persons. As discussed above, we need not analyze the merits of the § 20 claim against Kaizaki because we resolve those claims on the jurisdictional issue. And, as discussed below, we need not resolve

"actionable" when it satisfies the first two of these requirements, *i.e.*, it is a misrepresentation or omission of a material fact that the defendant had a duty to disclose. *See, e.g., Nathenson v. Zonagen Inc.*, 267 F.3d 400, 415 (5th Cir. 2001); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 179 (2d Cir. 2001). The district court held that the Retirement Fund's Complaint failed to plead adequately any actionable statements for any allegedly fraudulent statements. It held in the alternative that the Retirement Fund failed to plead scienter adequately. The district court did not address the remaining two elements of the claim: reliance and proximate cause. As detailed in the discussion that follows, the district court's merits holdings were in part erroneous.

1. Actionable Statements

Since their enactment in response to the stock market crash of 1929, the "basic policies underlying securities regulation" laws have been that "'there cannot be honest markets without honest publicity'" because "'manipulation and dishonest practices of the market place thrive upon mystery and secrecy.'" *Helwig*, 251 F.3d at 556 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 230, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988) (in turn quoting H.R.Rep. No. 1383, at 11 (1934)). The Supreme Court "'repeatedly has described the fundamental purpose of the Act as implementing a philosophy of full disclosure'" *Helwig*, 251 F.3d at 556 (quoting *Basic*, 485 U.S. at 230). Thus, federal securities laws prohibit certain "misrepresentations or omissions" in

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the "merits' of the control person liability theory against Ono beyond our conclusion that the Complaint does not adequately plead scienter against him.

connection with the sale or purchase of a security. *Morse*, 290 F.3d at 798.

In order to be actionable, however, the misrepresentation or omission in question must pertain to material information that the defendant had a duty to disclose, a set of requirements that serve as a limiting principle to the general policy of disclosure.[18] *See, e.g.*, *Basic*, 485 U.S. at 238 ("In order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were misleading as to a material fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.") (italics in original omitted); *In Re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) ("there is no general duty on the part of the company to provide the public with all material information."). As this Court has recognized, this set of requirements preserves the healthy limits on a public corporation's "duty to disclose all information, even colorably material," because corporations might otherwise "face potential second-guessing in a subsequent disclosure suit," a regime that would threaten to "deluge investors with marginally useful information, and would damage corporations' legitimate needs to keep some information non-public." *Sofamor Danek*, 123 F.3d at 403 (citation and internal quotation marks omitted). A duty to affirmatively disclose may arise when there is insider trading, a statute requiring disclosure," or, as relevant to this case, "an inaccurate, incomplete or misleading disclosure. "*In re Digital Island Sec. Litig.*, 357 F.3d 322, 329 n.4 (3d Cir. 2004) (quotation omitted).

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[18] As does the scienter requirement, discussed in detail in Part II(C)(2).

As for materiality, whether or not a statement is material turns on "a fact-intensive test." *Helwig*, 251 F.3d at 555.[19] Materiality "depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Id.* (quoting *Basic*, 485 U.S. at 240). That is, would the information, had it been presented accurately, have "altered the 'total mix' of information made available?" *Helwig*, 251 F.3d at 563 (quoting *Basic*, 485 U.S. at 231-32 (citation omitted)).

In this vein, this Court has distinguished between "hard" and "soft" information." *Sofamor Danek*, 123 F.3d at 401-02. Hard information" is "typically historical information or other factual information that is objectively verifiable." *Id.* (quotation omitted). Publicly disclosed, hard information is actionable if false and material.

"Soft information," on the other hand, includes "predictions and matter of opinions." *Id.* The failure to disclose soft information is actionable "'only if [it is] . . . virtually as certain as hard facts.'" *Id.* (quoting *Starkman v. Marathon Oil Co.*, 772 F.2d 231, 241 (6th Cir. 1985)). Thus, federal courts "everywhere 'have demonstrated a willingness to find immaterial as a matter of law certain kinds of rosy affirmation heard from corporate managers and numbingly familiar to the marketplace -- loosely optimistic statements that are so vague, [and] so lacking in specificity . . . that no reasonable investor could find them important to the total mix of information.'" *In re Ford Motor Co. Secs. Litig.*, 381 F.3d

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[19] *Cf.* R. Gregory Roussel, *Securities Fraud or Mere Puffery: Refinement of the Corporate Puffery Defense*, 51 Vand. L. Rev. 1049, 1064-66 (1998) (discussing the virtues of the "contextual standard," as distinguished from rigid, bright-line rules, in assessing whether a statement should be classified as puffery).

563, 2004 WL 1873808, *4 (6th Cir. 2004) (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996)).

However, opinions may be deemed false or misleading under the securities laws if proof of their falsity can be established "through the orthodox evidentiary process." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090, 1091-93; 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991). For such statements, "'a company is generally under no obligation to . . . volunteer [] information.'" *Helwig*, 251 F.3d at 564 (quoting, in a parenthetical, with approval *Kowal v. MCI Communications Corp.*, 305 U.S. App. D.C. 60, 16 F.3d 1271, 1277 (D.C. Cir. 1994)). If a company does volunteer information, though, "'its disclosure must be full and fair, and courts may conclude that the company was obliged 'to disclose additional material facts . . . to the extent that the volunteered disclosure was misleading . . . .'" *Id.* (citations omitted). Our securities laws therefore "require an actor to 'provide complete and non-misleading information with respect to the subjects on which he undertakes to speak.'" *Helwig*, 251 F.3d at 561 (quoting *Rubin v. Schottenstein*, 143 F.3d 263, 268 (6th Cir. 1998) (en banc)). Put another way, as Judge Boggs explained in an *en banc* decision for this court: "the question thus is not whether a [defendant's] silence can give rise to liability, but whether liability may flow from his decision to speak . . . concerning material details . . . without revealing certain additional known facts necessary to make his statements not misleading. This question is answered by the text of [SEC] Rule 10b-5(b) itself: it is unlawful for any person to 'omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . .'" *Rubin*, 143 F.3d at 268 (quoting 17 C.F.R. § 240.10b-5(b)).

With these standards in mind, we turn to analyze whether any of the numerous alleged fraudulent statements in this case were actionable. The statements divide into two categories: (1) statements by Bridgestone and Firestone that were allegedly false because they were material statements made regarding the quality of Firestone's tires "while in possession of specific, adverse information undermining the truth of those statements," Aplt's Br. at 40; and (2) allegedly false representations made by Bridgestone in the financial statements accompanying its Annual Reports.

a. Statements about the Quality or Safety of Firestone's ATX Tires

The Retirement Fund argues that the public statements by Bridgestone and Firestone summarized in Part I were actionable because they engendered a duty to disclose adverse information about the safety of Firestone's tires. These statements include Bridgestone's 1996 Annual Report statement that it sold "the best tires in the world," its publicly distributed written statement in "late 1996" that it had "no reason to believe there is anything wrong with [its ATX tires]"; 1997 Annual Report statement that its products demonstrated "global consistent quality"; 1997 Annual Report statement that "rigorous testing under diverse conditions at our proving grounds around the world helps ensure reliable quality for original equipment customers"; 1998 Annual Report statement that sales success in North American was due to "high regard among automakers for our strengths in product quality;" and 1999 Annual Report statement that "we have built a premium-quality for. . . Firestone tires" and that "aggressive product development" had "re-established the Firestone name as a vigorous brand in premium-grade tires;" as well as Firestone's statements in February 2000 that it had "full confidence" in the ATX tires and that "our experience

with Radial ATX indicates high consumer satisfaction with the quality and reliability of these tires"; in July 2000 that it had "full confidence" in its tires; on August 1, 2000 that "we continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires" and that "these are safe tires." The district court held that "plaintiffs fail to plead with sufficient particularity an omission theory of liability," App. at 1015 (Dist. Ct. Memorandum), reasoning that the Complaint "failed to make a prima facie showing that Bridgestone [or Firestone] knew to a 'substantial certainty' that Firestone's tires were defective." *Id.* at 1014 (quoting *Sofamor Danek*, 123 F.3d at 402). The district court concluded, as to Bridgestone's statements, that they were "statements of self-praise and confidence in its future," and therefore "constituted immaterial opinions" and on that basis dismissed the claims based on those statements. App. at 1019. Similarly, as to Firestone's statements, the district court held that they were "of general optimism and in defense of its products . . . [and] immaterial as a matter of law." *Id.* at 1029. Accordingly, the district court held that the statements at issue were non-actionable corporate "puffery," *id.* at 1019-20, stating that "reasonable investors expect corporate managers to be confident about their stewardship and the prospects of the business that they manage.'" *Id.* at 1018 (quoting *Shields v. Citytrust Bancorp.*, 25 F.3d 1124, 1129-30 (2d Cir. 1994).

On appeal, Bridgestone and Firestone likewise argue that these statements were immaterial puffery. As discussed below, with an important exception -- Firestone's August 1, 2000 statement concerning "objective data" -- we are persuaded by their argument.

I. Statements other than the August 1, 2000 Press Release

Other than the August 1, 2000 statement, we agree that the statements recited above are best characterized as loosely optimistic statements insufficiently specific for a reasonable investor "to find them important to the total mix of information." *In re Ford*, 381 F.3d 563, 2004 WL 1873808, at *4 (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d at 1217). These statements, both on their own terms and in context, lacked a standard against which a reasonable investor could expect them to be pegged; such statements describing a product in terms of "quality" or "best" or benefitting from "aggressive marketing" are too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision. The statements are analogous to those deemed immaterial by a broad spectrum of federal courts. *See, e.g.*, *Longman v. Food Lion, Inc.*, 197 F.3d 675, 684 n.2 (4th Cir. 1999) (concluding that the statements that "Food Lion is one of the best-managed high growth operators in the food retailing industry" and that it provided its employees with "some of the best benefits in the supermarket industry" were immaterial); *Grossman v. Novell, Inc.* 120 F.3d 1112, 1121 (10th Cir. 1997)(holding that a company's statement that it had achieved "substantial success" in integrating the sales force of two merged companies was immaterial puffery); *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 811 (2d Cir. 1996) (holding that a company's statements that it was "optimistic" about its earnings and "should deliver income growth consistent with its historically superior performance" was non-actionable "puffery"); *In re Cybershop.com Sec. Litig.*, 189 F. Supp. 2d 214, 229 & 232 (D. N.J. 2002) (holding that the statement that "we are well prepared for the holiday season and believe

it will clearly differentiate us as the market leader in our segment of online retail" was not material); *In re Peritus Software Servs., Inc.*, 52 F. Supp. 2d 211, 220 (D. Mass. 1999) (holding that the statement that company's product was enjoying "unprecedented market demand" was non-actionable puffery). We conclude that the district court did not err in dismissing the claims based on these statements.

ii. Firestone's August 1, 2000 "Objective Data" Representation

On August 1, 2000, Firestone released its statement that "we continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires." The context of statements is often telling. *See, e.g., Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989)("what might be innocuous 'puffery' or mere statement of opinion standing alone may be actionable as an integral part of a representation of material fact used to emphasize and induce reliance upon such are presentation."); *Scritchfield v. Paolo*, 274 F. Supp. 2d 163, 175-76 (D.R.I. 2003) (stressing that "a company's statements that it is 'premier,' 'dominant,' or 'leading' must not be assessed in a vacuum (i.e., by plucking the statements out of their context to determine whether the words, taken per se, are sufficiently 'vague' so as to constitute puffery"). So it is with Firestone's August 1, 2000 statement. In July 2000, consumers filed multiple lawsuits against Firestone alleging that ATX tire tread separation caused Ford Explorers to roll over and caused fatalities. That same month, several safety groups urged Ford to recall the Explorers with Firestone ATX tires on them. On August 1, 2000, Firestone issued the statement concerning the "objective data." A reasonable juror could infer that the "objective data" representation was a direct

response to the lawsuits, or to the public challenges to the safety of Firestone's tires, or to both.

A reasonable juror could also conclude that the statement, without some qualification or accompanying disclosure of the numerous pieces of evidence that tended to cut the other way, was a misrepresentation. In 1996, Firestone had performed random quality control high-speed durability tests on ATX tires. In one of the sample tests, Firestone examined 129 ATX tires made at the Decatur plant. Eighteen of those tires failed the test due to tire tread separation. In another random test of 229 ATX tires from Decatur, thirty-one failed. In an additional random test of 18 ATX tires, eight failed, seven of which were from the Decatur plant. Internal Firestone documents show that Firestone knew since 1996-1997 from property damage and injury claims and tire performance data, such as warranty adjustments and financial analysis of such claims, that its ATX tires were failing at unprecedented rates. Similarly, a Firestone chart reveals that from 1998 to 1999, tread separations for the Wilderness ATX tires -- one of the ATX models -- increased by 194%. According to a 1999 internal Bridgestone report, in 1997 and 1998, another of the ATX models -- the ATX II tires -- accounted for the majority of Firestone's claims but less than 10% of its *total* production. Further, in Venezuela, between 1990 and 1998, over forty people were killed in Explorer accidents due to ATX tire failures and Ford had demanded that Firestone alter the design of its ATX tire being sold in Venezuela to include a nylon layer.

Firestone does not point to any record evidence showing its statement regarding the "objective data" was supported with respect to the ATX tires. It *may* be the case that at the summary judgment or trial stages of this dispute, Firestone will identify evidence that persuades the finder of fact that, as

of the date of its statement on August 1, 2000 that "properly inflated and maintained Firestone ATX . . . tires are among the safest tires on the road today," *id.* at 171, the available objective data supported that claim. Or perhaps Firestone will introduce some other evidence showing that its statement about the objective data was in fact not misleading or false. However, at this stage in the lawsuit, construing the Complaint in a light most favorable to the Retirement Fund, *see PR Diamonds*, 364 F.3d at 680, we conclude that Firestone's representation concerning "objective data" could be deemed a material misrepresentation by a reasonable fact-finder. *Accord, e.g.*, *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 501-02 (9th Cir. 1992) (holding that the defendants' statements emphasizing superior quality were material because "a reasonable jury could conclude that Dataproducts publicly released optimistic statements when it knew its product could not be built reliably"); *In re ValuJet, Inc. Sec. Litig.*, 984 F. Supp. 1472, 1477-78 (N.D. Ga. 1997) (statement that airline's safety record was "certifiably among the very best in the airline industry" was material and actionable); *In re F & M Distribs. Sec. Litig.*, 937 F. Supp. 647, 653 (E.D. Mich. 1996) (holding that the defendant chain store's failure to disclose an adverse industry trend that made the "deal buying" strategy touted in its prospectus less viable than otherwise known could be actionable); *In re Medimmune, Inc. Sec. Litig.*, 873 F. Supp. 953, 967 (D. Md. 1995) (holding that a drug company's statements that "the results of treatment with [its product] were highly statistically significant along all of the efficacy parameters," and "the data are overwhelmingly good" were material and actionable); *Cohen v. Prudential-Bache Sec., Inc.*, 713 F. Supp. 653, 659 (S.D.N.Y. 1989) (holding that a broker's statement to a client that she "would receive a very strong cash flow without risk to her initial investment" could not be dismissed as immaterial puffery).

In holding that Firestone's August 1, 2000 statement was actionable, we express no opinion as to whether Firestone necessarily had an obligation to disclose the various safety and looming regulatory issues surrounding the ATX tires regardless of whether it affirmatively spoke on the subject. The Retirement Fund does not rely on that allegation and, indeed, has waived such an argument. *See* App. at 558 (the Retirement Fund stating in a brief to the district court that "plaintiffs do not contend that in the face of defendants' silence they should have disclosed the defects in the ATX tires."). We merely hold that once Firestone elected to make statements such as the statement regarding the "objective data," it was required to qualify that representation with known information undermining (or seemingly undermining) the claim. *Accord Mayer v. Mylod*, 988 F.2d 635, 639 (6th Cir. 1993) ("corporate officers are not required to speak, [but] once they do, they must be truthful if their comments are material to investors' decisionmaking."); *K-Tel Int'l Sec. Litig. v. K-Tel Int'l, Inc. (In re K-Tel Int'l Sec. Litig.)*, 300 F.3d 881, 896, 898 (8th Cir. 2002) ("the requirement is not to dump all known information with every public known announcement, but the law 'requires an actor to provide complete and non-misleading information with respect to the subjects *on which he undertakes to speak*'") (quoting *Helwig*, 251 F.3d at 561) (emphasis supplied by the Eighth Circuit).[20]

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[20] Contrary to Bridgestone and Firestone's assertions, such a conclusion is consistent, or not inconsistent, with this court's decision in *Sofamor Danek*, 123 F.3d at 401-02. In that case, the defendant corporation was *silent* as to the alleged products defects and likely regulatory problems and this court held there was no actionable omission. In contrast, Firestone (and Bridgestone) chose to speak, implicating, through that *choice*, the duty to speak truthfully as to the topics on which it spoke.

Firestone next argues that the August 1, 2000 statement is non-actionable because it was "immaterial as a matter of law." Aple Firestone's Br. at 40. Echoing the district court, Firestone argues that the statement was one of "'of general optimism and in its defense of its products'" *id.* (quoting App. at 1018), and one that "reflected the market's understanding that others had suggested the products were not as safe as Firestone believed." Aple Firestone's Br. at 47. As such, Firestone argues, the statement does "not come within the duty of disclosure" because such opinions are "'routinely discounted by reasonable investors.'" *Id.* at 44 (quoting *Sofamor Danek*, 123 F.3d at 402).

We reject this argument also, for several reasons. First, we do not agree that the statement that "the objective data clearly reinforces our belief that these are high-quality, safe tires" was a statement of general optimism or purely opinion. Rather, the statement was an assertion of a relationship between data and a conclusion, one that a finder of fact could test against record evidence.

Second, even if the statement regarding "objective data" was best classified as an opinion, it was still specific enough to form the basis of an actionable securities fraud claim. Federal courts have drawn the line on whether a statement may be actionable based, not on whether in the abstract a statement was best characterized as fact or opinion but, rather, if it was an opinion, on the *nature* of the statement. The key is whether the proposition at issue can be proven or disproven using standard tools of evidence. Thus, as alluded to above, vague statements not subject to verification by proof are generally deemed non-actionable puffery. But "opinion or puffery . . . in particular contexts when it is both *factual and material* . . . *may* be actionable." *Longman v. Food Lion, Inc.*, 197 F.3d 675, 684 (4th Cir. 1999) (emphasis supplied).

For example, in *Virginia Bankshares*, the Supreme Court held that an opinion expressed by a corporation's board members to its minority stockholders that the stock price of $42.00 for the purchase of the company's shares was a "high value" and represented a "fair" transaction could be both factual and material. 501 U.S. at 1091. In so holding, the Court expressly rejected the petitioner's argument, similar to that offered by Firestone here, that the Court "would invite amorphous issues outside the readily provable realm of fact if [it] were to recognize liability . . . on proof that the directors did not recommend the merger for the stated reason." 501 U.S. at 1093. "It is no answer to argue," the Court stated, "that the quoted statement on which liability was predicated did not express a reason in dollars and cents, but focused instead on the 'indefinite and unverifiable' term, 'high' value, much like the similar claim that the merger's terms were 'fair' to shareholders." *Id.* "The objection ignores the fact," observed the Court, "that such conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." *Id.* Rather, "provable facts either furnish good reasons to make a conclusory commercial judgment, or they count against it, and expressions of such judgments can be uttered with knowledge of truth or falsity just like more definite statements, and defended or attacked through the orthodox evidentiary process that either substantiates their underlying justifications or tends to disprove their existence." *Id.*[21]

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[21] This court has recognized that "*Virginia Bankshares* is instructive for" materiality analysis in § 10(b) cases because although the Court in *Virginia Bankshares* was concerned with § 14(a), not § 10(b) of the Securities Exchange Act, "the SEC has promulgated the same rule for each section: violations occur under each section whenever a statement is false or a material omission

This court's en banc decision in *Helwig* also reflected these insights. In that case, the defendant corporation stated that it was "comfortable" with favorable earnings per shares estimates made before the passage of a piece of legislation even though in secret, internal communications, the corporation was making negative predictions about the impact of the statute on earnings. *Helwig* recognized that such opinions about a verifiable assertion "contain 'at least three implicit factual assertions: (1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement.'" *Helwig*, 251 F.3d at 557 (quoting *Schneider v. Vennard (In re Apple Computer Sec. Litig.)*, 886 F.2d 1109, 1113 (9th Cir. 1989)). Reversing the district court's dismissal of the securities fraud claim, *Helwig* noted that unlike the facts underlying this court's decisions in "*Sofamor Danek*, [in which] the information claimed as adverse to the company had already been disclosed and was publicly available to permit an independent assessment by investors and analysts," or "*Starkman*, [which] was a case about non-disclosure," *id.*, the complaint in *Helwig* "was about *selective* disclosure of information . . . essential to complete a picture [the defendants] had only partially revealed." *Helwig*, 251 F.3d at 557 (citing *Sofamor Danek*, 123 F.3d at 401 and *Starkman*, 772 F.2d at 241) (emphasis supplied). "The protection for soft information," *Helwig* stated, "ends where speech begins." *Id.*

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makes the statements which are made misleading." *Mayer v. Mylod*, 988 F.2d 635, 639 n.2 (6th Cir. 1993) (citing 17 C.F.R. §§ 240.10b-5 and 240.14a-9 (1991)).

As in *Helwig*, the Retirement Fund's Complaint pleads a theory of liability for selective, incomplete disclosure. Following *Helwig*, we conclude that a reasonable juror in this case could conclude that Firestone's statement that "the objective data clearly reinforces our belief that these are high-quality, safe tires" carried with it the representation that there was a reasonable basis for that belief, and that Firestone was not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement, and that both those representations were misleading. That juror could thus find that the statement concerning objective data was actionable. *Accord Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996) (holding that a company's statements regarding the safety of its new products were actionable where the reassuring statements "were designed to prevent shareholder flight in the aftermath of a damaging report regarding the possible hazards of [the product]").

Finally, as to Firestone's contention that the statement about the "objective data" is non-actionable because it "reflected the market's understanding that others had suggested the products were not as safe as Firestone believed," Aple Firestone's Br. at 47, this argument mischaracterizes the facts as pled in the Complaint. A number of courts have indeed suggested that misrepresentations about a fact already known to the marketplace are not actionable.[22]

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[22] *See, e.g., Longman,* 197 F.3d at 684-85 (4th Cir. 1999) ("Plaintiffs' securities fraud claim cannot succeed because, despite the fact that Food Lion denied the charges, the nature of the off-the-clock claims and the claims' risk to earnings were in fact well known to the market before the PrimeTime Live broadcast, and therefore Food Lion's omissions were not material"); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1114-15 (9th Cir. 1989) ("We conclude that in a fraud on the market case, the defendant's

And, although this Court has not directly addressed this theory, it voiced the logical complement in *Helwig*, which, in reaching its conclusion that the statement at issue was material, relied in part on the fact that the information at issue was "known *exclusively*" to the defendants. 251 F.3d at 560 (emphasis supplied). It makes logical sense that a claim based on the alleged withholding from the public of information that contradicts information publicly stated is defeated by a demonstration that the allegedly withheld information was in fact disclosed to the public; however, that rule is not apposite here. Contrary to the implications of Firestone's argument, that "others" had "suggested the products were not as safe as Firestone believed" does not demonstrate that the market had received the adverse information – about the tires' test data, the claims for liability based on tire failure, and the deaths in the United States and abroad – that form the basis of the information the Retirement Fund alleges was withheld from the public. Rather, "in an open and efficient securities market . . . information important to reasonable investors (in effect, the market) is immediately incorporated into the stock price." *In Re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1425 (internal citation omitted). And, indeed, not until *after* Firestone's August 9, 2000 recall did the share value for both the Bridgestone common stock and Bridgestone ADRs each plummet by over one third of their value in approximately six weeks: between August 8, the day before the recall, and September 21, 2000, Bridgestone's common stock share price on the Tokyo stock exchange dropped from over $2,200.00 to less than $1,400.00, and its ADR share price from over $202.00 to less than $122.00. Accordingly, a reasonable juror

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failure to disclose material information may be excused where that information has been made credibly available to the market by other sources.").

could conclude that the revelations that accompanied the announcement of the August 2000 recall were in part reflected in this substantial share price change, which would suggest strongly that the market had *not* -- prior to the public disclosures encapsulated in the recall -- received the full extent of information related to the safety-related problems associated with Firestone's tires, and that such information was quite important to investors.

For the foregoing reasons, we hold that while most of the statements alleged by the Retirement Fund were insufficiently specific to be actionable, the August 1, 2001 statement regarding "objective data" is actionable. We turn now to Bridgestone's alleged misrepresentations in the Annual Reports' financial statements.

b. Bridgestone's Annual Report Financial Statements

The district court held that none of the claims based on financial statements in Bridgestone's Annual Reports for fiscal years 1996 through 1999 were actionable. The district court reasoned that the Complaint "failed to plead a single fact that would have caused a reasonable investor to believe that Bridgestone's financial statements were prepared according to United States GAAP, or that a reasonable investor would have relied on this belief," failed to "plead any particular fact that could establish any inference that Bridgestone violated Japanese GAAP," and that "even if Bridgestone was subject to United States GAAP, "the Complaint "failed to plead with particularity any facts establishing a strong inference that Bridgestone should have 'considered probable' a Firestone recall and thus established a huge contingent liabilities fund." App. at 1016 (quoting FASB 5). Bridgestone argues that we should affirm on essentially the district court's rationales. As discussed below, we disagree with that conclusion with

respect to Bridgestone's 1999 Annual Report but agree with the result reached by the district court concerning the claims based on Bridgestone's 1996-1998 Annual Report financial statements.

I. 1999 Annual Report

Issued in March 2000, the 1999 Annual Report included at least two representations that a reasonable juror might conclude were material misrepresentations: (1) that no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions (the "No Impairment" representation); and (2) that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires (the "No Loss" representation).

The "No Impairment" Representation

The 1999 Annual Report included several groups of statements that, taken together, constituted are presentation to the investing public that no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions. The below comparison of the Annual Report's accounting policy statements, the actual disclosures under those statements, and the alleged "on the ground" facts at Bridgestone and Firestone, reveals why a reasonable juror could conclude that this statement was a misrepresentation.

The accounting policy statements communicated to the investing public that if a loss or asset impairment was probable, the Annual Report would disclose that contingency in some form. The 1999 Report included a letter from Bridgestone's outside auditors stating that it was prepared "in

conformity with accounting principles generally accepted in Japan applied on a consistent basis." Under International Accounting Standard § 9010.08-.09, applicable in Japan pursuant to the International Accounting Standards Committee, "loss contingencies should be recorded if it is probable that an asset has been impaired or a liability incurred at the balance sheet date and a reasonable estimate of the amount of the resulting loss can be made." Section 9010.08-09 provides further that "if either of the conditions is met and the possibility of the loss is not remote, the existence of the contingent loss should be disclosed in the financial statements." The 1999 Report also stated that "the Japanese consolidated financial statements have been prepared in accordance with the provisions set forth in the . . . accounting principles and practices generally accepted in Japan ("Japanese GAAP")." It further represented that Bridgestone's "accompanying financial statements include the accounts of certain foreign subsidiaries, which are based upon U.S. GAAP," a reference to Firestone, its largest foreign subsidiary. We thus disagree with the district court's observation that no investor could have reasonably concluded that a representation was being made under United States GAAP.

United States GAAP, via FASB 5,[23] "requires that loss be accrued whenever it is probable a loss has been incurred or an

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[23] In the United States, GAAP "are the official standards adopted by the American Institute of Certified Public Accountants, a private professional association, through three successor groups it established: the Committee on Accounting Procedure, the Accounting Principles Board, and the Financial Accounting Standards Board (the 'FASB')." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 160 n.4 (2d Cir. 2000). "The SEC treats the FASB's standards as authoritative." *Id.*

asset impaired and the amount of the loss can be reasonably estimated. If the loss is at least reasonably possible, but no reasonable estimate can be made, the contingency at a minimum should be disclosed." The unmistakable representation, under both the Japanese and American GAAP policies,[24] was that if a loss or asset impairment was probable, the Annual Report reader would see a discussion of it in some form in the report. *A fortiori* then, the Report included the representation that if there were a substantial certainty of such an impairment, that contingency or risk would be disclosed. *Cf. United States v. Lamartina*, 584 F.2d 764, 766-67 (6th Cir. 1978) (embracing this greater-includes-the-lesser logic in the criminal context and noting that "a defendant may be found guilty of an offense necessarily included in the offense charged.").

The disclosures under the Annual Report's stated policies included no reference to the impairment or likelihood of impairment to the asset of the Firestone Brand. The notes to the Consolidated Financial Statements *did* include a category labeled "Contingent Liabilities," which disclosed deferred income tax assets, deferred tax liabilities, discounted export bills, and lease commitments, note regarding "Market Value Information," which provided a disclaimer that Bridgestone was "exposed to the currency fluctuation risks in relation" to certain "forward contracts and to the interest rate fluctuation in relation to interest rate swaps," as well as statements cautioning that "those derivatives do not exceed corresponding financial instruments," and that Bridgestone

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[24] The policies articulated in FASB 5 and § 910.08-09 are very similar if not identical in substance. The absence on Note 11's list of differences between U.S. and Japanese GAAP of any reference to the two provisions reinforces that notion.

"believes that the risk that the counterparts will not be able to fully satisfy their obligations under contracts is minimum." However, neither the Contingent Liability section nor the Market Value Information section, nor any other portion of the 1999 Annual Report, disclosed the contingency of any loss or asset impairment related to any of the Firestone tire products due to the lawsuits, regulatory scrutiny, or safety-related reasons. Nor did they disclose the potential *risk* of such an event.

The 1999 Annual Report's simultaneous inclusion of the accounting policies, the listed contingencies, and the absence of any mention of a contingency concerning Firestone tires constituted are presentation that no loss or asset impairment arising from Firestone tire products due to the lawsuits, regulatory scrutiny, or safety-related reasons was "probable" or "reasonably possible." The question then is whether a reasonable juror could find that the facts belied that representation.

Bridgestone suggests that it is only in hindsight evident that there was a probability or reasonable possibility of a substantially adverse event as of March 2000. We disagree. By March 2000, Bridgestone and Firestone, according to the allegations of the Complaint, had received thousands of claims for and complaints concerning ATX tire failures, covering hundreds of serious injuries and 174 fatalities by 2000 allegedly resulting from problems with the tires. Firestone had paid off State Farm for the costs of automobile accidents attributable to ATX tire failures. The investigations and scrutiny by the Arizona and Venezuelan governments reinforces the impression that evidence was present of serious risks of adverse consequences for the ATX brand. From 1998 to 1999, tread separations for one ATX model increased by 194%. In 1997 and 1998, another of Firestone's ATX

model's tires accounted for the majority of the company's claims but during those same years, that model accounted for less than 10% of Firestone's total production. These claims and suits and payments were discussed at least quarterly from 1997 to 1999 in meetings that consisted of Firestone's senior management group, including Bridgestone Executive Vice-president Ono, and Firestone's financial group, quality group, and public relations/marketing department. A major decision such as a recall by a Fortune 500 corporation is unlikely to simply materialize out of the blue. As the Complaint alleges, the various increasing problems at Firestone crescendoed in 1998 and 1999. From the facts pleaded, assumed to be true, and construing the complaint in the light most favorable to the plaintiffs, it was, under all these circumstances, at least reasonably possible" if not "probable" that, as of March 2000, the Firestone flagship brand ATX tires would experience a serious, adverse, financial event -- an impairment of the asset. Bridgestone's effective representation that no loss or asset impairment arising from Firestone tire products due to the lawsuits, regulatory scrutiny, or safety-related reasons was "probable" or "reasonably possible" could thus be deemed by a reasonable juror to have been a misrepresentation based on the facts available *at that time*.

The question, then, is whether the "No Impairment" representation was material. Put another way, was it "'*so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of [its] importance?*'" *Helwig*, 251 F.3d at 563 (quoting *Ganino*, 228 F.3d at 162) (emphasis in *Helwig*). We conclude that it was not. The 1999 Annual Report included at least six statements that stressed to shareholders or potential shareholders the significance of the Firestone brand or the American and North American market, of which Firestone was Bridgestone's major brand: (1) "We are determined to assert a singular

advantage in product technology. . . . We increased our market share in North America in 1999 in . . . the original equipment market. Our North American operations are approaching a market share of 20%."; (2) a representation that as a percentage of Bridgestone's net sales, its sales in the Americas were 41.5 %, the largest of any geographic sector; (3) "we increased our market share in North America in 1999 . . . Demand for original equipment tires continued to grow in 1999 in the booming North American automobile market"; (4) a statement under the bold, purple-colored, large font label of "Trends And Topics" that "our multibrand strategy -- centered on . . . Firestone . . . raised our market profile further in 1999;"(5) "aggressive product development and strategic marketing have re-established the Firestone name as a vigorous brand in premium-grade tires, as well as in large-volume, middle-market tires;" and that (6) "as a major supplier to leading European automakers, we have developed business with the North American operations of those automakers, too. We also supply tires to nearly all the Japanese-owned vehicle plants in North America." Firestone's financial and brand name health was of obvious importance to the overall state of Bridgestone's financial health. That relationship was evident both from its portrayal in the Annual Reports and in the severely adverse results that resulted immediately after the asset impairment occurred: in addition to the stock and ADR share price drops, recall that Firestone and Bridgestone each experienced a net $510 million loss for the 2000 fiscal year and that Bridgeport's net earnings in 2000 were 80% less than in fiscal year 1999. We conclude -- at a *minimum* -- that the probability or reasonably possibility of Firestone's brand name experiencing a significant asset impairment was not information "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of its unimportance." *Id.* This information was therefore not "immaterial" within the meaning of the

federal securities laws. 15 U.S.C. § 78u-5(c)(1)(A)(ii). A reasonable juror could conclude that Bridgestone's "no impairment" representation in the 1999 Annual Report was actionable.

The No Material Loss Representation

The second representation from Bridgestone's 1999 Annual Report that a reasonable jury could conclude was actionable was its effective representation that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires. FASB 5 "requires accrual by a charge to income (and disclosure) for an estimated loss from a loss contingency if two conditions are met: (a) information available prior to issuance of the financial statements indicates that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements, and (b) the amount of loss can be reasonably estimated." The Retirement Fund asserts that both FASB 5 and its Japanese analogue gave rise to a duty to disclose because Bridgestone "had specific knowledge throughout the Class Period that [it was] already incurring substantial loses through the replacement of tires, settlements of lawsuits and payment of claims." Aplt's Br. at 47.

Bridgestone responds on this point with two arguments. First, it argues that the Complaint's claims based on problems related to the tires' safety record are an impermissible attempt to plead fraud by hindsight. Bridgestone asserts that "the Retirement Fund "has simply seized upon disclosures made in later annual reports and alleged that they should have been in earlier ones." Aple Bridgestone and Kaizaki's Br. at 30 (internal quotations omitted). This is literally true but does not mean that the Complaint advances an impermissible theory of liability: the losses already sustained as of March 2000 were

clearly facts reasonably (and actually) available to Bridgestone in an amount calculable with precision or near-precision as of March 2000; if they were material and subject to disclosure under the stated accounting policies, it is no answer to say they were eventually disclosed later in time.

Bridgestone's second and more forceful argument is that these losses were not material. Bridgestone asserts that "the complaint contains no pleaded fact indicating Bridgestone knew about any substantial losses or that those amounts . . . actually were substantial for an $18 billion company." Aple Bridgestone and Kaizaki's Br. at 29 (quotation marks omitted). "Indeed," Bridgestone argues, "every manufacturer replaces its products, settles lawsuits, and pays claims as part of its day-to-day business; yet, no one would contend these activities alone require reserves." *Id.*

This argument is ultimately unpersuasive for three reasons. First, assuming the truth of the facts set forth in the Complaint, by March 2000 -- when the Bridgestone 1999 annual Report was issued -- over 2000 rollover accidents, 700 serious injuries and 170 fatalities had occurred yielding thousands of claims for and complaints concerning ATX tire failures and Bridgestone (via Firestone) incurred numerous categories of financial losses, including those affiliated with entering into numerous settlement agreements with the injured parties involving compensation, reimbursing State Farm, absorbing the cost of replacing the tires in Arizona, and absorbing the cost of adding a nylon layer to its tires in Venezuela. A reasonable juror could infer from this category-based evidence (as opposed to dollar-amount-based evidence not included in the Complaint) that the related losses were substantial. That the Retirement Fund has not through disclosure at this pre-discovery stage identified the precise amount of the payments as of March 2000, or amounts

corresponding to agreements reached by Bridgestone or Firestone by March 2000 for sums not as of then yet paid out, is no bar to the claim. The precise information as to dollar amount is presumably available thus far only to Bridgestone and may well emerge in discovery. It is enough at this motion to dismiss stage that the Complaint alleges specific losses via seemingly out of the ordinary payments on this wide array of issues, each of which, as stated, was a definite amount that had already been paid out by the time of the release of the subsequent annual report. *See* FASB 5 (requiring the disclosure of "information available prior to issuance of the financial statements indicating that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements" the amount of which can "be reasonably estimated.").

Second, while it is likely the case that not every settlement or claim requires a reserve, that is besides the point here. These payments were not as a group routine or minor; they covered thousands of claims that alleged a common problem with a major product of Bridgestone's largest subsidiary in its highest volume sales market, the Americas. Because the 1999 Annual Report represented that there were no actual losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires' failures, there was a duty to disclose any material information to the contrary, be it in the form of a reserve, notice of a contingency, or some other form of disclosure.

Third, to the extent the materiality question is close, the general rule for securities fraud cases is that "at [the motion to dismiss] stage in the proceedings, a complaint may not properly be dismissed on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable

minds could not differ on the question of their unimportance." *Helwig*, 251 F.3d at 553 (internal citations, quotations, and ellipses and emphasis omitted). Courts "generally reserve such questions for the trier of fact." *Id.* (collecting cases). We think this approach is appropriate here, both because a reasonable juror could find this claim actionable and because we are reversing on independent grounds with respect to a separate statement in the 1999 Annual Report.

ii. Annual Reports 1996-1998

With respect to the financial statements for the Annual Reports for fiscal years 1996 to 1998, we conclude that the district court did not err in dismissing the claims based on those statements. Unlike the 1999 Annual Report, these reports contained no representation to the effect that United States GAAP standards applied. Any claim, if at all, based on these Annual Reports would have to be based solely on the implied statement (to American investors at that) that International Accounting Standard § 9010.08-.09 applied. Most significantly, much of the evidence that the Complaint relies on as establishing that the asset was impaired or likely to suffer impairment became fully available after March of 1999, when the last of these three reports was issued, particularly the data summary on the 34 suits against Bridgestone based on deaths or injuries by consumers of Firestone-equipped Ford Explorers from rollovers allegedly caused by Firestone tires, the tread separations increases from 1998 to 1999, and the dramatic rise in problems in 1998 and 1999. The facts tending to undermine the truth of the Annual Reports' representations regarding impairment and loss were thus not known at all or not known to their full extent as of the dates that the Annual Reports for the 1996-1998 fiscal years were issued.

For the foregoing reasons, we conclude that the Complaint pleaded three actionable claims: (1) Firestone's August 1, 2000 "objective data" representation; (2) Bridgestone's "No Impairment" representation; and (3) Bridgestone's "No Loss" representation.

2. Scienter

Mindful that to survive a motion to dismiss, a federal securities fraud claim must "withstand an exacting statement-by-statement analysis," *In Re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 886 (W.D. N.C. 2001), the question then is whether the Complaint adequately pled scienter for these particular statements as against Bridgestone, Firestone, or Ono. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976). "As with all fraud claims, Federal Rule of Civil Procedure 9(b) applies to pleading a defendant's state of mind, allowing that "'malice, intent, knowledge, and other condition of mind of a person may be averred generally.'" *PR Diamonds, Inc.*, 364 F.3d at 682 (quoting Fed. R. Civ. P. 9(b)).

However, in 1995, Congress, having "concluded that Rule 9(b) had "'not prevented abuse of the securities laws by private litigants,'"[25] enacted the Private Securities Litigation Reform Act ("Reform Act"). The Reform Act grafted on "special requirements for pleading scienter in federal securities fraud cases." *PR Diamonds*, 364 F.3d at 682. As amended by the Reform Act, the securities laws provide:

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[25] *Comshare*, 183 F.3d at 548 (quoting H.R. Conf. Rep. No. 104-369 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 818).

> In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state *with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.*

15 U.S.C. § 78u-4(b)(2) (emphasis added). Under the Reform Act, if a plaintiff does not meet this requirement, the reviewing district court "shall, on the motion of any defendant, dismiss the complaint." 15 U.S.C. § 78u-4(b)(3).[26] In enacting the Reform Act's scienter-related provisions, Congress sought simultaneously to curb frivolous securities fraud litigation, which "'unnecessarily increases the cost of raising capital and chills corporate disclosure, [and is] often based on nothing more than a company's announcement of

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[26] We take no position as to the constitutionality of the Reform Act's heightened scienter pleading requirements. The Seventh Amendment to the Constitution provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. Am. VII. Traditionally, there has been a right to jury trial for securities fraud claims. *See, e.g., SEC v. Infinity Group Co.* 212 F.3d 180, 196 (3d Cir. 2000). The Reform Act compels dismissal unless the facts pleaded in the Complaint produce a "'strong inference that the defendant acted" with scienter. 15 U.S.C. § 78u-4(b)(2)). One might argue that for cases where a juror *could* conclude that the facts pleaded showed scienter, but that conclusion would *not* be the most plausible of competing inferences, a Seventh Amendment Problem is presented. However, the Retirement Fund has not advanced any such argument and we decline to address the merits of this constitutional question *sua sponte*.

bad news, not evidence of fraud,'" *Comshare*, 183 F.3d at 548-49 (quoting S. Rep. No. 104-98 (1995), 1995 U.S.C.C.A.N. 679, 690), and "to protect investors and to maintain confidence in the securities markets." H.R. Conf. Rep. No. 104-369, at 31 (1995), U.S.C.C.A.N. at 730. Reflecting this balance, this court has noted that after the Reform Act, for those complaints advancing *non*-frivolous, well-pled allegations of scienter, "our willingness to draw inferences in favor of the plaintiff remains unchanged." *Helwig*, 251 F.3d at 550; *see also id.* at 553 (rejecting an interpretation of the Reform Act under which "it [would] become a choke-point for meritorious claims").

In elaborating on the meaning of the statute's term "strong inference," *Helwig* explained that "inferences must be reasonable and strong--but not [necessarily] irrefutable." *Id.* The Complaint "need not foreclose all other characterizations of fact, as the task of weighing contrary accounts is reserved for the fact finder." *Id.* Rather, under the "strong inference" requirement, the Retirement Fund is "entitled only to the most plausible of competing inferences." *Id.* Strong inferences . . . involve deductive reasoning; their strength depends on how closely a conclusion of misconduct follows from a plaintiff's proposition of fact." *Id.* (quoted with approval in *In Re Ford*, 381 F.3d 563, 2004 WL 1873808 at *2). Our task is thus to determine whether the Complaint alleges facts that, if true, would, by forming the basis for a strong inference, "convince a reasonable person that the defendant knew a statement was false or misleading." *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1107 (10th Cir. 2003). Ultimately, in our scienter analysis, we "employ[] a totality of the circumstances analysis whereby the facts argued collectively must give rise to a strong inference of at least recklessness." *PR Diamonds*, 364 F.3d at 691. "This necessarily involves a sifting of allegations in the complaint." *PR Diamonds*, 364 F.3d at 691 (quoting

Helwig, 251 F.3d at 551). Towards that end, *Helwig* identified nine factors that, while "not exhaustive," are "helpful" in determining whether the facts as pled are "probative" of scienter in securities fraud actions:

(1) insider trading at a suspicious time or in an unusual amount;

(2) divergence between internal reports and external statements on the same subject;

(3) closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information;

(4) evidence of bribery by a top company official;

(5) existence of an ancillary lawsuit charging fraud by a company and the company's quick settlement of that suit;

(6) disregard of the most current factual information before making statements;

(7) disclosure of accounting information in such a way that its negative implications could only be understood by someone with a high degree of sophistication;

(8) the personal interest of certain directors in not informing disinterested directors of an impending sale of stock; and

(9) the self-interested motivation of defendants in the form of saving their salaries or jobs.

251 F.3d at 552 (citing *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196 (1st Cir. 1996)) (in turn, collecting cases). With these standards in mind,[27] we turn to analyze scienter as to each of the three relevant defendants, the two corporate legal persons -- Firestone and Bridgestone -- and the one individual, Firestone CEO and Bridgestone Executive Vice-President Ono. *Id.*

Scienter as to Firestone

On August 1, 2000, Firestone released its statement that "we continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires." With respect to Firestone's scienter concerning this statement, at least five of the nine non-exclusive *Helwig* factors are apparent in the Complaint's alleged facts. First, there was a clear "divergence between internal reports and external statements on the same subject," *Helwig*, 251 F.3d at 552; witness the contrast between the data known or available to Firestone as of August 2000 -- concerning the evidence of defective tires from Decatur and three years of a marked rise in the rates of deaths, injuries and claims and lawsuits based on several thousand rollover accidents, hundreds of injuries, and nearly 200 fatalities in the United States, over forty deaths in Venezuela, the multiple deaths in Saudi Arabia -- versus the unqualified positive comments on the "objective data." Firestone's awareness of the circumstances at the Decatur plant, including in particular

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[27] We note that, contrary to Bridgestone's and Firestone's arguments, which rely heavily on *Honeyman v. Hoyt (In re Carter-Wallace Sec. Litig.)*, 220 F.3d 36 (2d Cir. 2000), and *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000), the precedent of *this* circuit frames our scienter inquiry in this claim for securities fraud based on partial or incomplete disclosure.

the strike, the untrained replacement workers, the production schedule time increase imposed by Bridgestone and Firestone in the labor negotiations with the union, and the test results pointing to higher rates of problems in the Decatur-produced ATX tires, make the imputation of scienter reasonable.[28]

Other factors reinforce this conclusion. There was a "closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information." *id.*; the August 1 statement about "objective data" was followed one week later by the recall of 6.5 million tires and four months later by the admission that many of the tires from the Decatur plant were made with a shoulder pocket more likely to crack than normal due to an improper angle and were more likely to fail to stick together properly. There was also a "disregard," or at least a seeming disregard, of "the most current factual information before making statements" *Id.* Further, to the extent Firestone disclosed its data to Bridgestone in a form substantially similar to that presented in Bridgestone's Annual Reports, Firestone's "disclosure of accounting information [was made] in such a way that its negative implications could only be understood by someone with a high degree of sophistication." *Id.* Finally, assuming, as the Complaint alleges, that Bridgestone executives "kept the accident rate data which they had and which showed these serious problems from safety regulators . . . so they could report huge profits and their executives could retain their positions of power, prestige and profit and Bridgestone's stock and ADRs would continue to trade at inflated, higher

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[28] Arguably, the known background of the 1979 recall based on a faulty adhesion compound discovered after Firestone's public disavowals of such a problem and the strikingly similar pattern to the problems identified in Firestone's 2000 investigative report makes it that much more reasonable to impute scienter to Firestone.

prices, providing the executives with direct economic benefits based on their stock holdings and options and allowing them to personally pocket huge bonuses based on corporate profits," there was thus a "self-interested motivation of defendants in the form of saving their salaries or jobs." *Helwig*, 251 F.3d at 552.[29]

Three of the nine *Helwig* factors are clearly absent as pertains to Firestone, although in a sense these factors all go to the *same* question: conflict of interest. That is, there is no evidence of alleged insider trading at a suspicious time or in an unusual amount, no evidence of bribery by a top company official, and no evidence of personal interest of certain directors in not informing disinterested directors of an impending sale of stock.

That covers eight of the nine *Helwig* factors. A word is in order on whether the remaining factor is present, *i.e.* whether there is the "existence of an ancillary lawsuit charging fraud by a company and the company's quick settlement of that suit." *Id.* There is not, strictly speaking, such evidence because the claims in question were not based on fraud *per se*. However, the presence of closely related evidence carries some weight, particularly given that the list of factors is "non-exhaustive." *Id.* Firestone entered into multiple settlement agreements in response to product liability suits under which the settlement agreements with plaintiffs were sealed, the parties entered into stipulated protective orders to conceal

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[29] We reject Firestone's suggestion that the withholding of information by senior corporate executives to effectuate an inflation of the executives' bonuses, stock prices, and job security is an "ordinary corporate event." Aple Firestone's Br. at 45. Even if a regular occurrence, it is not an event this court sanctions as being *legitimately* ordinary.

discovery, and Firestone would have returned to it "damaging documents." The gravamen of these claims and lawsuits, though framed as pre-litigation claims or lawsuits in tort, was closely parallel to that of this suit: the tires were not safe and Firestone should be held accountable for that fact. Moreover, Firestone secretly settled with State Farm all claims for insurance in exchange for lack of disclosure by State Farm and avoided through a secrecy agreement with the Venezuelan government any disclosure of its having added nylon layers to ATX tires in Venezuela. The evidence of these secret settlements gets at the same notion as does the *Helwig* factor instructing courts to analyze whether there have been ancillary lawsuits filed charging fraud followed by quick settlement of such suits. The apparent animating idea is that a company engaging in such practices is, all things being equal, more likely than not aware of the improper nature of the practice being alleged, or at least of the perception of the given problem, which puts it on notice and, is fair to say, generates a duty to inquire. These settlements are thus appropriate to weigh in our scienter analysis, since "this court has made clear that 'the label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states.'" *Minger v. Green*, 239 F.3d 793, 799 (6th Cir. 2001) (quoting *United States v. Louisville & Nashville R. Co.*, 221 F.2d 698, 701 (6th Cir. 1955). Thus, in substance, if not form, we think a sixth of the nine factors is also present.

Given all this, we conclude under the totality of the circumstances that "the facts argued collectively. . . give rise to a strong inference of at least recklessness." *PR Diamonds*, 364 F.3d at 691. The Retirement Fund has therefore

adequately pleaded scienter with respect to its claim against Firestone for the Firestone's August 1, 2000 statement.[30]

Scienter as to Bridgestone

We next analyze whether the Complaint adequately pled scienter against Bridgestone for the two actionable representations in the 1999 Annual Report discussed above in Part II(C)(i)(a): (1) the "No Impairment" representation - that no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from

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[30] We do not foreclose the possibility that, going forward, Firestone may be held liable for Bridgestone's misrepresentations to the extent the Retirement Fund can prove Firestone communicated misleading results to Bridgestone. "The requirement that the plaintiff allege that the defendant made a misrepresentation does not mean that the plaintiff must allege that the defendant communicated that misrepresentation directly to the plaintiff." *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398, 407 (S.D.N.Y. 1998); *see, e.g.*, *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997) (defendant " 'cannot escape liability simply because it carried out its alleged fraud through the public statements of third parties' ") (quoting *Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996)); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) ("there is no requirement that the alleged violator directly communicate misrepresentations to plaintiffs for primary liability to attach"). If the Retirement Fund can show that Firestone was the originator of Bridgestone's misrepresentations regarding Firestone and that Firestone knew or should have known that its misrepresentation would be communicated to investors, primary liability should attach. *See Anixter*, 77 F.3d at 1226. We need not assess here the factual question of whether Firestone was the original of Bridgestone's misrepresentations regarding Firestone and that Firestone knew or should have known that the misrepresentation would be communicated to investors.

customers or regulators' actions and (2) the "No Loss" representation - that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires. A brief word is in order, though, on the nature of these claims. Contrary to Bridgestone's characterizations, the Retirement Fund's theory is *not* that the Complaint relies on the violation of GAAP to prove scienter. As Bridgestone correctly points, that allegation, without more, would not be sufficient to plead scienter adequately. *See, e.g., Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 432-33 (6th Cir. 1980) (concluding that although "there is sufficient evidence to support the Court's finding that]the defendant] inadequately tested . .. financial figures in certain respects, [] the evidence falls far short of proving that [the defendant] intended to deceive the stockholders."). Rather, GAAP is only part of the Complaint's explanation of the falsity of the claim: as discussed below, the Complaint alleges a wide range of facts above and beyond the violation of GAAP on which a reasonable juror could conclude scienter was proven. That brief detour aside, we turn to the two statements.

Bridgestone's Scienter Concerning its No Impairment Representation

As to Bridgestone's scienter with respect to the "No Impairment" representation, we conclude that "the most plausible of competing inferences" arising from the evidence is that Bridgestone was at least reckless as to the falsity of that representation. *Helwig*, 251 F.3d at 553. The analysis on this claim breaks down similarly to that for Firestone: four -- arguably five -- of the *Helwig* factors are present.

First, and in this case most significantly, the Complaint pleads facts that, if proven, could show a divergence between

internal reports and external statements on the same subject. By the end of 1999, consumers had filed fifty lawsuits based on alleged problems with the ATX tires against Bridgestone or Firestone or both, thirty-four of them filed between 1997 and 1999. As former Firestone Vice-President of Quality Assurance Robert Martin testified in his deposition, Ono, who was *Bridgestone's* Executive Vice-President in addition to his role as Firestone CEO, was a member of the working group that from 1997 to 1999 tracked the lawsuits' status. An internal 1999 Bridgestone document included data that one of the ATX tire models -- the ATX II -- was the basis of the majority of the claims against Firestone but only ten percent of its production. A reasonable juror could conclude that this was a red flag as to problems with the tire model. Similarly, the ATX Wilderness model experienced in 1999 a rise in claims for tire tread separations of 194% over the previous year, another potential red flag. Thus, the facts known or available to Bridgestone were seemingly in tension with the representation that no impairment risk of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions and that there was no contingency risk of such a loss. Consider also Firestone's previous tire tread problems, fine, and massive recall, with which it is reasonable to assume, given due diligence standards, that Bridgestone, as its suitor in a multi-billion dollar purchase the previous decade, was aware. This history was in the known corporate background and should have made Bridgestone more attuned to the likelihood, or at least non-trivial, contingent possibility, of a major financial hit to Firestone as the lawsuits, settlements, and regulatory and public scrutiny surrounding the Firestone ATX tires, as used on the Explorer, intensified from 1996 to 1999. This is particularly so given that the Americas were Bridgestone's largest sales market, that the North American market was, according to Bridgestone's Annual Reports, a

major source of past and presumed future growth, that Firestone was the primary engine fueling that growth, and that the Explorer contract in particular was -- by all appearances -- a key to Firestone's return to profitability.

Three, arguably four, other factors are further probative of Bridgestone's scienter, albeit with less force than the first one. First, for the reasons just outlined, we conclude that the facts could show that Bridgestone disregarded "the most current factual information before making statements." *Helwig*, 251 F.3d at 552. Second, the 1999 Annual Report, by combining its statement of accounting policy with its silence, can be viewed as "disclosure of accounting information in such a way that its negative implications could only be understood by someone with a high degree of sophistication." *Id.* Third, for the reasons discussed above with respect to Firestone, the evidence supports a finding of "self-interested motivation of defendants in the form of saving their salaries or jobs." *Id.* Fourth, for the reasons discussed in the context of Firestone but also applicable to Bridgestone, the existence of ancillary claims by consumers and State Farm Insurance, lawsuits, and settlements based on claims alleging harm from unsafe ATX tires, and Bridgestone's quick and secret settlements of such claims, arguably is also probative of Bridgestone's recklessness as to the truth of its "No Impairment" representation.

The four other *Helwig* factors admittedly are not probative of scienter. As to the "closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information," Bridgestone's statement in March 2000 occurred over four months before the information accompanying the safety recall was disclosed, too distant in time to draw an adverse inference. And, as discussed in the Firestone context, the Complaint does not allege insider

trading at a suspicious time or in an unusual amount, evidence of bribery by a top company official, or the personal interest of certain directors in not informing disinterested directors of an impending sale of stock.

Nonetheless, considering the totality of the circumstances, in particular the divergence of internal and external statements with respect to clearly material information going to one of Bridgestone's major flagship brands, "the facts argued collectively . . . give rise to a strong inference of at least recklessness" as to the truth of its "No Impairment" representation. *PR Diamonds*, 364 F.3d at 691.[31] The Retirement Fund has therefore adequately pleaded scienter with respect to its claim against Bridgestone for that representation.

Bridgestone's Scienter as to the "No Loss" Representation

We turn now to analyze whether the facts as pleaded give rise to a strong inference of recklessness by Bridgestone as to its representation in the 1999 Annual Report that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires. Again, we think the key factor here is the "divergence between internal reports and external statements on the same subject." *Helwig*, 251 F.3d at 552. As discussed, Ono, Bridgestone's Executive Vice-President, met at least quarterly with Firestone's senior management group from 1997 to 1999, the financial group, the quality group, and the public

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[31] *Cf. In re Ford*, 381 F.3d 563, 2004 WL 1873808, at *6 (in affirming the dismissal of securities fraud claims against Ford arising out of facts common to this case, noting that "it would be reasonable to expect the cost of replacing tires would be on Bridgestone.").

relations / marketing department and in those meetings discussed the tread-peeling claims lodged against Bridgestone (as well as against Firestone). Assuming the truth of the Complaint's allegations, these discussions addressed the lawsuits, claim settlements, and informal complaints that led to investigations by governmental authorities in Arizona, Venezuela, and Saudi Arabia, as well as the secret settlements with State Farm under which Firestone reimbursed State Farm for accidents allegedly caused by ATX tire failures. Ono's awareness of the claims as gleaned from these meetings is directly attributable to Bridgestone[32] because "the scienter of the senior controlling officers of a corporation may be attributed to the corporation itself to establish liability as a primary violator of § 10(b) and Rule 10b-5 when those senior officials were acting within the scope of their apparent authority." *Adams v. Kinder-Morgan*, 340 F.3d at 1107; 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 12.8[4], at 444 (4th ed. 2002) ("Knowledge of a corporate officer or agent acting within the scope of [his] authority is attributable to the corporation.").

Two facts reinforce the notion that Bridgestone knew or should have known that it was taking heavy losses via claims settlement resulting from alleged problems with the ATX tires. First, Bridgestone should have been particularly attuned to the possibility of defect-caused problems from ATX tires manufactured at the Decatur plant in light of its awareness of the strike and the round-the-clock production schedule and the "implemented adjustments in working hours that permit our

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[32] The Retirement Fund makes no serious argument that Bridgestone can be held liable for Firestone's August 1, 2000 statement; we therefore do not address that argument. We note though that generally, "a subsidiary's fraud cannot be automatically imputed to its corporate parent." *In re Comshare*, 183 F.3d at 554.

plants to operate 24 hours a day, seven days a week" that Bridgestone's 1996 Annual Report trumpeted, showing that it was clearly aware of the situation. Second, a 1999 Bridgestone internal report shows that the ATX II model was accounting for a quite disproportionate percentage of claims alleging tire failure relative to its production quantity as a Firestone's total tire output: over 50% versus 10%.

There is, as with the other two actionable statements and for the reasons previously stated, evidence of the existence of ancillary lawsuits and the company's quick settlement of those suits, of disregard of the most current factual information before making statements, of disclosure of accounting information in such a way that its negative implications could only be understood by someone with a high degree of sophistication, and of the self-interested motivation of defendants in the form of saving their salaries or jobs. Also like the analysis of the "No Impairment" representation, there is a lack of probative evidence as to the remaining *Helwig* factors.

Again, given this totality of circumstances, "the facts argued collectively . . . give rise to a strong inference of at least recklessness" by Bridgestone as to the truth of its "no loss" representation. *PR Diamonds*, 364 F.3d at 691. The Retirement Fund has therefore also adequately pled scienter with respect to its claim against Bridgestone for this representation.

Scienter as to Ono

The Complaint attributes to Ono, as an individual corporate officer of Firestone and Bridgestone, all of the alleged misrepresentations of those two corporate defendants. The Retirement Fund seeks to attach liability to Ono based on

his status as Firestone CEO and Bridgestone Executive Vice-President when those two companies issued the alleged misrepresentations. The Retirement Fund argues that "Ono is Liable for Firestone's and Bridgestone's statements under the group-published doctrine and inference," also known as the "group-pleading" doctrine. Aplt's Br. at 48. The district court dismissed the claim against Ono for failure to plead scienter. As detailed below, we agree with that result.

At least two circuits have specifically recognized a "group pleading" exception to the pleading-with-particularity requirements of Federal Rule Civil Procedure 9(b). *See Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1440 (9th Cir. 1987); *Schwartz v. Celestial Seasonings, Inc.*,124 F.3d 1246, 1254 (10th Cir. 1997). That exception is premised on the assumption that "in cases of corporate fraud where the false or misleading information is conveyed in prospectuses, registration statements, annual reports, press releases, or other 'group-published information,' it is reasonable to presume that these are the collective actions of the officers." *Wool*, 818 F.2d at 1440.

Firestone argues that this doctrine runs afoul of the amended pleading requirements embodied in the Reform Act, which requires, for adequate pleading of scienter, that a federal securities fraud complaint state the relevant facts "with particularity." 15 U.S.C. § 78u-4(b). The United States Court of Appeals for the Fifth Circuit and a number of district courts have held that the group-pleading doctrine is foreclosed by the Reform Act.[33] Generally without discussion of the effect of the Reform Act, the several circuits that embraced

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[33] *See Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 364 (5th Cir. 2004) (collecting cases).

the group-pleading doctrine prior to the passage of the Reform Act have continued to apply that doctrine since the Reform Act's enactment. *See Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065-66 (9th Cir. 2000); *Schwartz*, 124 F.3d at 1254. This court has not taken a position on whether such an exception exists. Courts are divided on this issue.[34]

We need not decide here the current viability of the group-published doctrine because resolution of that question is not required to decide this case. The Complaint pleads, regarding Ono, little more than his corporate titles, dates of employment and resignation, and attendance at the quarterly meetings. The Retirement Fund does not allege by direct allegation or even upon information and belief that Ono played any role in drafting, reviewing, or approving the Firestone's "objective data" representation or the Bridgestone annual reports, 1999 or any other years. Nor does it allege that he was, as a matter of practice, or by job description, typically involved in the creation of such documents. Even if we permit the group-pleading inference, these alleged facts, without more, are not enough to plead scienter adequately, *See, e.g., Johnson v. Tellabs, Inc.*, 262 F. Supp. 2d 937,

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[34] *Compare, e.g., In re SmarTalk Teleservices, Inc. Sec. Litig.*, 124 F. Supp. 2d 527, 545 (S.D. Ohio 2000); *In re Raytheon Sec. Litig.*, 157 F. Supp. 2d 131, 152-53 (D. Mass. 2001); *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1, 17 (D.D.C. 2000); *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1340-41 (S.D. Fla. 1999); *In re Stratosphere Corp. Sec. Litig.*, 1 F. Supp. 2d 1096, 1108 (D. Nev. 1998) (holding that the group pleading doctrine survived the enactment of the Reform Act), *with In re Miller Indus., Inc. Sec. Litig.*, 12 F. Supp. 2d 1323, 1329 (N.D. Ga. 1998); *Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1350 (S.D. Cal. 1998);(holding that the Reform Act abolished the group pleading doctrine)

946-47 (N. D. Ill. 2003) ("Even if the group pleading doctrine survives the [Reform Act], . . . [a] plaintiff is . . . required at least to include allegations . . . relating to an individual defendant's duties . . . that create a presumption that the company's statement was somehow . . . attributable to an individual defendant. Simply alleging an individual defendant's title is not enough."); *In re Baan*, 103 F. Supp. 2d at 18 (noting that to satisfy the group-pleading doctrine, a complaint "must identify the roles of the individual defendants, and describe their involvement, if any, in preparing the misleading statements"). Accordingly, we conclude that the district court did not err in dismissing the claims in the Complaint against Ono for failure to adequately allege scienter.[35]

III. CONCLUSION

To summarize, we hold that: (1) the district court did not err in granting Kaizaki's motion to dismiss for lack of personal jurisdiction; (2) because the Complaint, for Firestone's August 1, 2000 statement that "we continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires," adequately alleges an actionable statement and scienter against Firestone, the district court erred in dismissing the claim based on that statement; (3) the district court did not err in dismissing the claims against Firestone for

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[35] At first glance, it might seem incongruous to reach this conclusion after relying in part on Ono's knowledge of the claims settlements as a basis for Bridgestone's scienter on that claim. However, while an individual officer's scienter may be attributed to the corporation, liability for the corporation's act does not, absent independent evidence, generally flow from the corporation to the corporate officer.

its numerous other statements because those statements were not material; (4) the district court erred in dismissing the claims against Bridgestone based on two of its effective representations in the 1999 Annual Report -- (i) that no impairment of Bridgestone's corporate assets was substantially certain to occur through problems arising from customers or regulators' actions, and (ii) that there were no actual, material losses connected to the lawsuits and responses to the regulatory scrutiny of the ATX tires -- because for those representations, the Complaint adequately pled an actionable statement and scienter against Bridgestone; (5) the district court did not err in dismissing the claims based on Bridgestone's representations in the financial statements of the 1996-1998 Annual Reports because those statements were not misrepresentations; and (6) the district court did not err in dismissing the claims against Ono for lack of scienter. We therefore need not reach any of the district court's additional rulings.[36]

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[36] In connection with the defendants' motions to dismiss, the district court issued two rulings in addition to those discussed in the opinion, neither of which we need to analyze. First, the district court denied Bridgestone's motion to dismiss for lack of personal jurisdiction. See App. at 987-97 (Dist. Ct. Memorandum). Because Bridgestone does not cross-appeal, we do not address this aspect of the district court's ruling. *See Spann v. Colonial Village, Inc.*, 283 U.S. App. D.C. 216, 899 F.2d 24, 35 (D.C. Cir. 1990) (Ginsburg, R.B., J.) (noting that objections to "personal jurisdiction . . . can be waived at any stage of a proceeding and ordinarily are waived by failure to take a cross-appeal") (citing *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 n.11, 44 S. Ct. 560, 68 L. Ed. 1087 (1924)). Second, although the district court did not enter a Judgment in concert with its September 30, 2002 Order granting the several motions to dismiss, the Retirement Fund treated the district court's dismissal Order as a Judgment and, accordingly, on October 16, 2002, timely filed a motion pursuant to Federal Rule

To withstand the 12(b)(6) motions by Bridgestone and Firestone, the Retirement Fund must for each alleged misrepresentation have adequately alleged five elements: (1) a misrepresentation or omission; (2) of a material fact that the defendant had a duty to disclose; (3) made with scienter; (4) justifiably relied on by plaintiffs; and (5) proximately causing them injury. In addition to dismissing the claim against Kaizaki for lack of personal jurisdiction, the district court in its 12(b)(6) analysis held that the Complaint did not satisfy the first three elements as against Bridgestone, Firestone, and Ono, holdings as to which, as just summarized, we reverse with respect to Bridgestone and Firestone and affirm as to Ono. The district court did not address the final two of the five requisite elements: justifiable reliance and proximate cause. The parties' briefs did not address these elements on appeal. As a "'general rule . . . a federal appellate court does not consider an issue not passed upon below.'" *Pinney Dock & Transport Co.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)). We see no special reason to do so here. Consequently, we remand to the district court to consider whether the Complaint adequately pleads justifiable reliance and proximate cause with respect to the three

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of Civil Procedure 59(e) to alter or amend the Judgment or in the alternative for leave to file a Proposed Amended Consolidated Complaint, which the Retirement Fund attached to its Rule 59(e) motion, along with numerous proposed exhibits. *See* App. at 1039-1319. On February 25, 2003, the district court denied that motion on the grounds of undue delay and futility. *See id.* at 1446-58. Because we have resolved the appeal on the question of whether the district court's *initial* dismissal was correct, the question of whether the district court also erred in its denial of the motion for leave to amend is moot. We therefore do not address it.

actionable statements as against Bridgestone and Firestone, and for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:01-0017

[Filed February 27, 2003]

In re BRIDGESTONE SECURITIES LITIGATION	)

JUDGE ECHOLS

Presently pending before the Court are Plaintiffs' Motion to Alter Judgment and for Leave to Amend Consolidated Complaint (Docket Entry No. 144), to which Defendants have responded in opposition, and Defendants Bridgestone Corporation and Yoichiro Kaizaki's Motion to Strike (Docket Entry No. 150), to which Plaintiffs have responded in opposition. For the reasons explained in the Memorandum entered contemporaneously herewith, Plaintiffs' Motion is hereby DENIED, and Defendants' Motion is hereby DENIED as moot.

It is so ORDERED.

/s/
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:01-0017

[Filed February 27, 2003]

In re BRIDGESTONE SECURITIES LITIGATION	)

JUDGE ECHOLS

MEMORANDUM

Presently pending before the Court are Plaintiffs' Motion to Alter Judgment and for Leave to Amend Consolidated Complaint (Docket Entry No. 144), which Defendants oppose, and Defendants Bridgestone Corporation and Yoichiro Kaizaki's Motion to Strike (Docket Entry No. 150), which Plaintiffs oppose.

I. PROCEDURAL HISTORY

Plaintiffs in this securities class action[1] filed a Consolidated Complaint (the "Complaint") on May 11, 2001, against Defendants Bridgestone Corporation ("Bridgestone"), Bridgestone/Firestone, Inc. ("Firestone"), Yoichiro Kaizaki,

[1] Plaintiffs represent a class constituting all purchasers of Bridgestone common stock and American Depository Receipts ("ADRs") between March 31, 1998, and August 31, 2000 (the "Class Period").

and Masatoshi Ono (collectively, "Defendants"), alleging violations of Section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b) (1994), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1999), promulgated thereunder. Plaintiffs alleged also that Defendants Kaizaki, Bridgestone, and Firestone were liable as "controlling persons" under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a) (1994).

Plaintiffs alleged that Defendants committed securities fraud by making false and misleading statements to conceal defects in Firestone ATX, ATX II, and Wilderness AT tires (collectively, "tires") manufactured by Bridgestone's U.S. subsidiary, Firestone, for use principally on Ford Motor Company's ("Ford") Explorer sport-utility vehicle. In particular, Plaintiffs alleged that Defendants made false and misleading statements endorsing the safety and quality of Firestone's products and its testing and manufacturing processes, while concealing their growing awareness that Firestone's tires were defective and dangerous.

Plaintiffs alleged also that Bridgestone failed to disclose the likelihood and cost of a prospective recall of the tires due to the alleged defects. According to Plaintiffs, this omission artificially inflated Bridgestone's earnings during the class period and constituted a material misstatement of the company's financial condition. Plaintiffs further alleged that Defendants Bridgestone, Firestone, and Kaizaki were liable as control persons: Bridgestone as a controlling person of all Defendants, Firestone as the controlling person of Ono, and Kaizaki as the controlling person of Bridgestone and hence Firestone.

Defendants Bridgestone and Kaizaki moved to dismiss for lack of personal jurisdiction and failure to state a claim

(Docket Entry Nos. 99 and 102, respectively), and Defendants Firestone and Ono moved to dismiss for failure to state a claim (Docket Entry Nos. 97 and 108, respectively). Plaintiffs opposed all the motions.

By Memorandum and Order entered October 1, 2002 (the "Order"), the Court denied Bridgestone's Motion to Dismiss as to lack of jurisdiction but granted Defendants' other Motions to Dismiss, thus dismissing the case in its entirety. (*See* Order, Docket Entry Nos. 142, 143).

Plaintiffs now ask the Court to alter the Order dismissing their claims and request leave to amend the Complaint, pursuant to Federal Rules of Civil Procedure 59 and 19, respectively. In addition, Plaintiffs submit their Proposed Amended Consolidated Complaint (the "PACC"). (*See* Pls.' Mem. in Supp. of Mot. to Alter J. and for Leave to Amend Consolidated Compl., Docket Entry No. 145, Ex. A).

II. PLAINTIFFS' PROPOSED AMENDMENTS

"In response" to the Order dismissing their claims, "[P]laintiffs have added a wealth of new facts which demonstrate that [D]efendants" committed securities fraud, including documentary and statistical evidence and "expert" analysis, *id.* at 2, as well as "numerous internal Bridgestone/Firestone documents [not contained in the Complaint], new allegations regarding [D]efendants' knowledge during the Class Period, and an expert declaration that unequivocally demonstrates that [D]efendants knew that the Firestone . . . tires [at issue] were dangerously defective." *Id.* at 5.

Specifically, Plaintiffs submit the declaration of Daniel Metz, who they allege is a retired professor of engineering

from the University of Illinois with over 30 years of experience in automobile vehicle dynamics, "as well as numerous internal Bridgestone/Firestone documents which reveal that the [tire] manufacturing processes were out of statistical control, as Bridgestone/Firestone had experienced a significant increase in tread separation defects with the tires it was manufacturing at [one of its] plant[s]." *Id.* at 2.

Plaintiffs also submit the declaration of Bjorn Steinholt, purportedly a chartered financial analyst, "who has concluded that statements made by defendants during the Class Period, regarding the safety and quality of their tires, including the . . . tires [at the center of this lawsuit], contained material information that a reasonable investor would have considered prior to making an investment decision in Bridgestone." *Id.* at 2-3.

"Finally," according to Plaintiffs, "the PACC contains newly-alleged facts that demonstrate that Bridgestone's financial statements were prepared in violation of both Japanese and United States GAAP."[2] *Id.* at 3. To that end, Plaintiffs submit the declaration of Koichi Okamoto, a purported certified public accountant "who is fully aware of both Japanese and United States GAAP" and who "opines that Bridgestone's financials . . . failed to accrue losses for the estimated replacement costs of the Explorer tires in direct violation of Japanese and United States GAAP." *Id.*

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[2] Generally Accepted Accounting Principles.

III. PLAINTIFFS' MOTION TO ALTER AND AMEND IS DENIED

Following entry of a final judgment, such as the Court's dismissal of the Complaint,[3] a plaintiff may not seek to amend its complaint under Rule 15 without first moving to alter or vacate judgment pursuant to either Rule 59 or Rule 60 of the Federal Rules of Civil Procedure. *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002). In the instant Motion, Plaintiffs move the Court pursuant to Rule 59 and also to Rule 15. The Court's analysis under both Rule 59 and Rule 15 "turn[s] on the same factors." *Id.* at 799.

A. Plaintiff's Motion Fails Rule 59

Under Rule 59, a court may alter or amend its judgment because: (1) of an intervening change of controlling law; (2) evidence not previously available has become available; or (3) such action is necessary to correct a clear error of law or prevent manifest injustice. *See Gencorp., Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Only the presence of at least one of these three criteria justify alteration

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[3] As both Plaintiffs and Defendants Bridgestone and Kaizaki point out, although the Court did not expressly state in its Order that it was dismissing the Complaint with prejudice, this was in fact the nature of the dismissal, which obviously constituted a final judgment of Plaintiffs' claims on their merits. *See* Fed. R. Civ. P. 41(b) (stating that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits" with prejudice); *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (clarifying that under Rule 41, "an 'adjudication upon the merits' is the opposite of a 'dismissal without prejudice'").

of a court's final judgment, as a Rule 59(e) motion "is not an opportunity to re-argue a case," *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998) (citation omitted), and it is well-established that "[a] motion for reconsideration which presents the same issues already ruled upon by the court, either expressly or by reasonable implication will not be granted." *Dell v. Straub*, 2002 WL 1303089, at *1 (E.D. Mich. 2002) (citation omitted).

The Court finds no justification to alter the Order. Plaintiffs do not argue that the Court committed legal error or was manifestly unjust in the Order, nor do they assert a change in controlling law. Plaintiffs do not even assert the existence of newly discovered evidence, which might justify amendment of the Order under Rule 59. Rather, Plaintiffs seek to amend the Complaint to add purported expert interpretation of statistical data that they possessed or could have possessed prior to the Court's entry of the Order dismissing the case. However, "[i]t is well established . . . that a district court does not abuse its discretion in denying a Rule 59 motion when it is premised on evidence that the party had in its control prior to the original entry of judgment." *Emmons v. McLaughlin*, 874 F.2d 351, 358 (6th Cir. 1989).

Plaintiffs' reliance on *Morse* is unpersuasive, as that case is factually different and easily distinguishable from the instant action. In *Morse*, the magistrate judge recommended that the defendants' motion to dismiss be granted without prejudice to permit the plaintiffs to file an amended complaint. *See* 290 F.3d at 798. Immediately after the magistrate's recommendation, the plaintiffs filed a Rule 15 motion to amend. *See id.* The district court never ruled on that motion, however, and two years later it dismissed the case without addressing the plaintiffs timely motion to amend

pursuant to Rule 15. *See id.* In overruling the dismissal of the action with prejudice, the Sixth Circuit held that plaintiffs' failure to tender their proposed amended complaint with their pre-judgment request to amend did not constitute bad faith or dilatory tactics. *See id.* at 800.

The facts involved in *Morse* are dramatically different from those at issue in the instant Motion, and thus the case does not compel the Court to adopt Plaintiffs' reasoning. Plaintiffs in this case did not request leave to amend the Consolidated Complaint with any of these new allegations prior to the Order. Rather, it appears that they consciously elected not to request leave to amend before judgment. Plaintiffs now explain their failure (conscious or unintentional) to seek leave to amend earlier on the grounds that they did not expect the Court to dismiss the Complaint, and they support their instant Motion in part on the grounds, essentially, that now that they know the nature of the infirmities from which the Court found their Complaint to suffer, they should be permitted the opportunity to amend - essentially, to improve the Complaint in light of the Order. However, as Defendants correctly rejoin, "Plaintiffs [are] not entitled to an advisory opinion from the Court informing them of the deficiencies of the [C]omplaint and then an opportunity to cure those deficiencies," *Begala v. PNC Bank, Ohio, N.A.*, 214 F.3d 776, 784 (6th Cir. 2000), nor do "a district court's responsibilities . . . include instructing ostensibly sophisticated securities class action counsel how to plead an actionable complaint." *Morse*, 290 F.3d at 800.

Prior to the entry of the Order, the Court thoroughly reviewed all the evidence in the record and the applicable law. It finds no reason to reconsider that evidence or alter its analysis now. Thus, the Court shall deny Plaintiffs' request that the Court alter the Order under Rule 59.

B. Even If Plaintiffs' Motion Satisfied Rule59, Amendment of the Complaint Still Would be Improper Under Rule 15

Having denied Plaintiffs' Rule 59 Motion, it follows that the Court must deny their Rule 15 Motion. *See Morse*, 290 F.3d at 799 (stating that following entry of final judgment, a plaintiff may not amend the complaint under Rule 15 unless the trial court first alters or vacates its judgment pursuant to Rule 59); 6 Charles Alan Wright, et al., Federal Practice and Procedure § 1489 (2d ed. 1990) (stating that "[m]ost courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 . . . ," and that this requirement "imposes some important restrictions on the ability to employ Rule 15(a) . . . which means that relief will not be available in many instances in which leave to amend would be granted in the prejudgment situation").

Even were the Court to grant Plaintiffs' Rule 59 request, however, it still would deny their request to amend the Complaint pursuant to Rule 15(a). Generally, leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), and should be denied only upon "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

However, the Court possesses full discretion in deciding whether to grant leave to amend, and "while Rule 15 plainly embodies a liberal amendment policy, in the post-judgment context, [the Court] must also take into consideration the competing interest of protecting the 'finality of judgments and

the expeditious termination of litigation.'" *Morse*, 290 F.3d at 800 (quoting *Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991)); *see Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000) (ruling that a trial court's discretion to allow amendments "narrows considerably after entry of judgment"). And when amendment is sought at a late stage in the proceedings, the plaintiff bears an increased burden to justify its failure to move earlier. *See Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999).

In this case, even if it were appropriate for the Court to consider Plaintiffs' Rule 15 request, the Court would deny it on the grounds of undue delay or dilatory motive and of futility. It is appropriate for the Court to deny a request to amend "premised on evidence that the party had in its control prior to the original entry of judgment." *Emmons*, 874 F.2d at 358 (6th Cir. 1989). Plaintiffs have proffered no explanation for their decision not to include this evidence in the Complaint, or to request leave to amend the Complaint before the Court entered its Order, despite their possession of the evidence prior to that time.

Further, Plaintiffs' proposed amendments are futile, because they do not provide the cause of action that is lacking in the Complaint. For example, while Plaintiffs' expert Bjorn Steinholt states that he believes some of Defendants' statements were material, Plaintiffs provide no newly discovered facts from which Mr. Steinholt reaches his conclusion. Rather, they merely seek to amend the Complaint to add a purported expert's judgment about the same evidence the Court already reviewed and found immaterial. Nor do Plaintiffs present newly discovered evidence as to Defendants' alleged scienter or misrepresentations, which are equally crucial elements of a securities fraud claim. Similarly, while

Plaintiffs offer the opinion of Koichi Okamoto, an accountant, that Defendant Bridgestone violated Japanese GAAP by failing to account for a potential tire recall by Firestone and/or Bridgestone as a contingent liability, they have adduced no new facts to establish that Bridgestone should have known that the recall was probable, an essential component of liability under that theory.

In short, the addition of these declarations would not create a cause of action where none now exists. Thus, even assuming arguendo that the Court were to grant Plaintiffs' Rule 59 request to amend or vacate the Order, granting leave to amend the Complaint would be futile and, therefore, inappropriate under Rule 15.

IV. DEFENDANTS' MOTION TO STRIKE IS DENIED AS MOOT

Defendants Bridgestone and Kaizaki move the Court to strike the entire Appendix of exhibits and attachments, including the declarations of purported experts, submitted by Plaintiffs in support of their Motion to Alter Judgment and for Leave to Amend. Defendants contend that the exhibits and declarations are improper, and therefore that the Court should strike them in their entirety and not consider them in ruling on Plaintiffs' Motion. After reviewing the briefs and cases cited by the parties in support of their respective positions, the Court is inclined to agree with Plaintiffs that because they incorporated the exhibits in their proposed Amended

Complaint, the Court should consider them pursuant to Federal Rules of Civil Procedure 10(c) and 59.[4]

Given that inclination, the Court considered all of Plaintiffs' submissions contained in the Appendix to the Memorandum in support of the instant Motion (*see* Docket Entry No. 145, Ex. A). Because, after reviewing that material, the Court has determined to deny Plaintiffs' Motion, it shall deny as moot Defendants' Motion to Strike.

V. CONCLUSION

Based on the foregoing reasons, the Court will DENY Plaintiffs' Motion to Alter Judgment and for Leave to Amend the Complaint and will DENY as moot Defendants Bridgestone and Kaizaki's Motion to Strike.

An appropriate Order will be entered.

/s/_____
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

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[4] On the other hand, were the Court faced with the necessity of ruling on Defendants' Motion, it also would be inclined to strike some of the purported experts' declarations, on the grounds that they state inappropriate legal conclusions.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:01-0017
(Consolidated Cases)

[Filed October 1, 2002]

In re BRIDGESTONE SECURITIES LITIGATION	)
	)
CITY OF MONROE EMPLOYEES RETIREMENT SYSTEM	)
	)
v.	)
	)
BRIDGESTONE CORPORATION, ET AL.	)
	)
PATRICIA ZIEMER	)
	)
v.	)
	)
BRIDGESTONE CORPORATION, ET AL.	)

JUDGE ECHOLS

MEMORANDUM AND ORDER

Presently pending before the Court are the following motions, all of which Plaintiffs oppose: (1) Defendant Bridgestone Corporation's ("Bridgestone") Motion to Dismiss for lack of personal jurisdiction and failure to state a claim (Docket Entry No. 99); (2) Defendant Yoichiro Kaizaki's ("Kaizaki") Motion to Dismiss for lack of personal jurisdiction and failure to state a claim (Docket Entry No. 102); (3) Defendant Bridgestone/Firestone, Inc.'s ("Firestone") Motion to Dismiss for failure to state a claim (Docket Entry No. 97); and (4) Defendant Masatoshi Ono's ("Ono") Motion to Dismiss for failure to state a claim (Docket Entry No. 108). For reasons explained herein, the Court shall DENY Defendant Bridgestone's Motion to Dismiss for lack of jurisdiction and GRANT all of Defendants' other Motions as provided in the Court's Order which is entered contemporaneously herewith.

For the convenience of the reader, a Table of Contents is included on the last page of this Memorandum.

I. PROCEDURAL HISTORY

On January 4, 2001, Plaintiff City of Monroe Employees Retirement System ("Monroe") filed this securities fraud class action against Defendants Bridgestone, Firestone, Kaizaki, and Ono (collectively, "Defendants") under Section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b) (1994), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1999), promulgated thereunder. Monroe alleges also that Defendants Kaizaki, Bridgestone, and Firestone are liable as "controlling persons" under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a) (1994). Plaintiff Patricia Ziemer filed a separate class action against Defendants under

the same federal laws on January 22, 2001, in case No. 3:01-0070. On April 11, 2001, Magistrate Judge Joe Brown consolidated the two cases and appointed Monroe as Lead Plaintiff of the class action. (Docket Entry Nos. 57 and 58). On May 11, 2001, Plaintiffs filed a Consolidated Complaint (the "Complaint") against Defendants for securities fraud under Section 10(b), Rule 10b-5, and Section 20(a), on behalf of a class constituting all purchasers of Bridgestone common stock and American Depository Receipts ("ADRs") between March 31, 1998, and August 31, 2000 (the "Class Period").

Plaintiffs allege Defendants committed securities fraud by making false and misleading statements to conceal defects in Firestone ATX, ATX II, and Wilderness AT tires (collectively, "tires") manufactured by Bridgestone's U.S. subsidiary, Firestone, for use principally on Ford Motor Company's ("Ford") Explorer sport-utility vehicle. In particular, Plaintiffs allege that Defendants made false and misleading statements endorsing the safety and quality of Firestone's products and its testing and manufacturing processes, while concealing their growing awareness that Firestone's tires were defective and dangerous. Plaintiffs allege also that Bridgestone failed to disclose the likelihood and cost of a prospective recall of the tires due to the alleged defects. According to Plaintiffs, this omission artificially inflated Bridgestone's earnings during the class period and constituted a material misstatement of the company's financial condition. Plaintiffs further allege that Defendants Bridgestone, Firestone, and Kaizaki are liable as control persons: Bridgestone as a controlling person of all Defendants, Firestone as the controlling person of Ono, and Kaizaki as the controlling person of Bridgestone and hence Firestone.

Bridgestone and Kaizaki have filed motions to dismiss for lack of personal jurisdiction. All Defendants have filed motions to dismiss for failure to state a claim.

II. PERSONAL JURISDICTION

Bridgestone and Kaizaki seek to dismiss the Complaint for want of personal jurisdiction, as well as for failure to state a claim. "The logical priority of jurisdictional considerations" requires the court to address the jurisdictional issue first. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1158 (5th Cir. 1983).

A. Procedural Posture under Rule 12(b)(2)

A court should dismiss an action if it lacks personal jurisdiction over the defendant. Fed. R. Civ. P. 12(b)(2). The plaintiff bears the burden of showing that jurisdiction exists. *See Int'l Techs. Consultants, Inc. v. Euroglass S.A.*, 107 F.3d 386, 391 (6th Cir. 1997) (citation omitted). A court confronted with a motion to dismiss for lack of jurisdiction must choose from three options: "it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). Which method to select lies in the trial court's discretion. *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989). When foregoing an evidentiary hearing and relying solely on parties' submissions to decide a Rule 12(b)(2) motion, the court must review the evidence in the light most favorable to the plaintiff, *see Nationwide Mut. Ins. Co. v. Trvg Int'l Ins. Co., Ltd.*, 91 F.3d 790, 793 (6th Cir. 1996), and the plaintiff need make only a prima facie showing of jurisdiction to defeat a motion to dismiss. *See Compuserve, Inc. v. Patterson*, 89

F.3d 1257, 1262 (6th Cir. 1996) (citation omitted). The Plaintiff's burden is "relatively slight." *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988).

A "court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal," since to do otherwise would allow non-resident defendants to "regularly avoid[] personal jurisdiction simply by filing an affidavit denying all jurisdictional facts . . . ." *Theunissen*, 935 F.2d at 1459; *see also Aristech Chem. Int'l, Ltd. v. Acrylic Fabricators, Ltd.*, 138 F. 3d 624, 626 (6th Cir. 1998); *Mich. Nat'l Bank*, 888 F.2d at 466 (because district court eschewed evidentiary hearing, "it was obligated to look solely to the plaintiff's pleadings and affidavits . . . [and] ignore contrary assertions by the [defendant]"). Dismissal "is only appropriate if all the specific facts which the plaintiff . . . alleges collectively fail to state a prima facie case for jurisdiction." *Compuserve*, 89 F.3d at 1262 (citation omitted). A Court may consider deposition testimony and affidavits offered by plaintiffs in support of their prima facie case for jurisdiction. *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971); *see Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 368 (3d Cir. 2002) ("in reviewing a motion to dismiss under Rule 12(b)(2), we must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff"); *Weidner Communications, Inc. v. H.R.H. Prince Bandar Al Faisal*, 859 F.2d 1302, 1306 n. 7 (7th Cir. 1988) (citation omitted) ("the party asserting jurisdiction is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record").

In the instant case, exercising its discretion, the Court has chosen to resolve the jurisdictional issues on the basis of the pleadings, affidavits, and other evidence before it and to forego an evidentiary hearing. Thus, Plaintiffs need make

only a prima facie showing that the Court's assertion of jurisdiction is proper. To determine if Plaintiffs have met their burden, the Court will not consider Defendants' controverting assertions.

B. Constitutional Requirements

Where, as here, plaintiffs sue under a federal statute authorizing worldwide service of process,[1] a court may exercise personal jurisdiction over a defendant "to the limits of the Due Process Clause of the Fifth Amendment." *SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996) (citation omitted), and the relevant forum for analyzing the extent of the defendant's contacts is the United States as a whole. *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993). Minimum contacts are the starting point for a jurisdictional due process analysis. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The nature of the defendant's contact with the forum determines whether general or specific jurisdiction exists. *Compuserve*, 89 F. 3d at 1263.

General jurisdiction exists when the defendant's contacts with the forum are so "continuous and systematic" that they approximate physical presence; in which case, the forum may exercise "judicial power with respect to any and all claims" against the defendant, regardless of their relation to the defendant's contacts with the forum. *Kerry Steel v. Paragon Indus., Inc.*, 106 F.3d 147, 149 (6th Cir. 1997); *see also Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437, 446

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[1] Plaintiffs sue Defendants under the Securities Exchange Act of 1934, 15 U.S.C. § 78t, which authorizes service of process anywhere in the world.

(1952); *Dickson Marine, Inc. v. Panalpina,* Inc., 179 F.3d 331, 339 (5th Cir. 1999) ("[u]nlike the specific jurisdiction analysis, which focuses on the cause of action . . . a general jurisdiction inquiry is dispute blind, the sole focus being on whether there are continuous and systematic contacts between the defendant and the forum"). Courts have identified a variety of factors relevant to whether a corporation's contacts are sufficient to justify assertion of general jurisdiction, including the volume of the defendant's business in the forum, whether the defendant maintains an office in the forum, whether the defendant sends agents into the forum or advertises there, and whether the defendant designates an agent for service of process in the forum. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 411-14 (1984). None of these factors is dispositive, but the standard for establishing general jurisdiction is very high, substantially higher than that for specific jurisdiction. *See Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990); *Met. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir. 1996).

If a defendant's contacts are not sufficiently pervasive to confer general jurisdiction, the forum may assert only specific jurisdiction on claims arising from or related to defendant's contacts with the forum. *Kerry Steel*, 106 F.3d at 149 (citing *Helicopteros Nacionales*, 466 U.S. at 414). To make a prima facie showing of specific jurisdiction, a plaintiff must satisfy three criteria: (1) the defendant purposefully availed itself of the benefit of acting in or causing an effect in the forum, (2) the cause of action arises from or is related to defendant's contacts with the forum, and (3) the defendant's acts or their consequences have a "substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *Calphalon Corp. v. Rowlette*, 228

F.3d 718, 721 (6th Cir. 2000) (citation omitted); *see also Compuserve*, 89 F.3d at 1263.

The main stricture on exercising jurisdiction under the third criterion of this tripartite test is fairness: the forum's exercise of jurisdiction over the defendant must comport with "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted). Under this principle, the defendant's contacts with the forum must have been sufficient to provide it with "fair warning" that those contacts could establish jurisdiction. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (defendant's activities within the forum must make reasonably foreseeable to defendant the possibility of being haled into a forum court).

Purposeful availment is the "'sine qua non'" of [specific] jurisdiction," *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1273 (6th Cir. 1998). "The true question is not whether an" occurrence giving rise to a cause of action in the forum "was theoretically foreseeable but whether it was reasonable for the [defendant] to anticipate that he would be haled into court in that [forum] because by his own acts he purposefully availed himself of the benefit's of that [forum's] laws and the potential market for his products." *In re Baan Co. Sec., Litig.*, 81 F. Supp.2d 75, 79 (D.D.C. 2000). The main function of the purposeful availment requirement is to prevent nonresident defendants from being haled into court solely as the result of random, attenuated, or fortuitous contacts with the forum. *Burger King*, 471 U.S. at 475.

If the Court determines that Defendants' contacts are sufficient to satisfy due process, it still must determine whether exercising jurisdiction would be prudent. The Court

must balance "the burden on the defendant [if subjected to jurisdiction in the furum], the interests of the forum . . . and the plaintiff's interest in obtaining relief," with an eye also to "the interstate Judicial system's interest in" judicial economy as well as the interstate interest "in furthering fundamental substantive social policies." *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of Calif.*, 480 U.S. 102, 113 (1987). The Supreme Court has rejected mechanical application of the jurisdictional tests and has cautioned that the facts of each individual case must be weighed to determine whether asserting jurisdiction would comport with fair play and substantial justice. *Euroglass*, 107 F.3d at 395 (citing *Burger King*, 471 U.S. at 485-86).

The Court must pay particular attention to the burden on a foreign defendant. The burden of defending in a foreign legal system is "unique" and should be afforded "significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114. As the Supreme Court has instructed, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* at 115 (citation omitted). The Sixth Circuit Court of Appeals has recognized in dicta that Japanese defendants face significant burdens in defending an action in the United States. *See Aristech*, 138 F.3d at 628 (noting the particular burden on a foreign defendant when a United States court's assertion of jurisdiction will require defendant "to travel from the other side of the world") (citing *Asahi*, 480 U.S. at 114).

III. JURISDICTION OVER BRIDGESTONE AND KAIZAKI

A. Plaintiffs' Alleged Facts Relevant to Jurisdiction

Mindful of its obligation to ignore Defendants' controverting assertions and to view the facts in the light most favorable to Plaintiffs, the Court finds the following facts relevant to Plaintiffs' prima facie case for jurisdiction over Bridgestone and Kaizaki: Bridgestone, a Japanese corporation with its headquarters in Tokyo, manufactures and sells tires and a variety of other products all over the world. Individual shares of Bridgestone stock trade solely on Japanese exchanges. In the United States, Bridgestone's stock can be purchased solely in bundles of ten, as ADRs. These ADRs are issued by American banks and traded on the over-the-counter market in the United States; they do not, however, trade on any American exchange. Consequently, Bridgestone is not required to and does not register its equity securities in the United States with the Securities Exchange Commission ("SEC").

Plaintiffs allege that Bridgestone first entered the United States market in 1968, through a sales subsidiary in California. According to Plaintiffs, Bridgestone first began producing tires through a U.S. subsidiary in 1983, when it purchased a Firestone truck plant in LaVergne, Tennessee. Today, Bridgestone owns approximately 20 subsidiaries around the world that also manufacture and sell tires. The largest of these subsidiaries, Firestone, is incorporated in Ohio and has its principal place of business in Nashville. In 1988, Bridgestone acquired all of Firestone's stock. Although Firestone is Bridgestone's wholly-owned subsidiary, the two are separately managed. Firestone manufactures its own brand of tires at several plants in the United States for sale here and

abroad. In 1990, Bridgestone consolidated its operations in the Americas with Firestone's operations under the Firestone company's management.

Bridgestone describes itself as a global entity with "regional headquarters in Nashville and Brussels." During the Class Period, Bridgestone stated in its 1998Annual Report that it develops tires in Akron, Ohio, as well as other locations. Bridgestone also touted in its 1999 Annual Report a new plant in Aiken, South Carolina. In addition to installing tires as original equipment on Ford automobiles, Bridgestone supplies tires to Japanese automobile manufacturers to be installed on automobiles destined for export to the United States. In its 1999 Annual Report, Bridgestone lauded its Japanese plants' ability to adjust to changing demand worldwide and to increase exports in order to supplement local production (such as in the United States).

Plaintiffs also allege that the Court should assert jurisdiction based on the fact that Defendant Ono, who was Chief Executive Officer of Firestone as well as an Executive Vice President and Director of Bridgestone during the Class Period, maintained a continuous presence in the United States during the Class Period. According to Plaintiffs, Ono's presence here is "critical" to establishing jurisdiction over Bridgestone. Plaintiffs also allege, Bridgestone "dominated" Firestone's management because other directors and officers served on both companies' boards during the Class Period. Most pertinent to the jurisdictional inquiry over Bridgestone and, of course, Kaizaki, Plaintiffs allege that Defendant Kaizaki was Chairman and CEO of Firestone from 1991 to 1993, during which time he lived in the United States. Plaintiffs allege not only that this period of residency establishes general jurisdiction over Kaizaki but also that it is an important fact in establishing general jurisdiction over

Bridgestone. According to Plaintiffs, the personnel-, resource-, and information-sharing between Bridgestone and Firestone establish an agency relationship sufficient to confer jurisdiction. In short, Plaintiffs allege that the close relationship between the two companies should cause the Court to find that Firestone was not a separate entity but rather a division of Bridgestone.[2]

Finally, Plaintiffs allege that Defendants' post-Class Period actions, especially Bridgestone's supply of new tires to Firestone after the recall and Kaizaki's expressions of concern over Firestone quality-control and damage to the Firestone brand name, establish that their contacts with the United States were systematic and continuous.

B. Plaintiffs' Prima Facie Case for Jurisdiction over Bridgestone

Plaintiffs posit two theories for asserting jurisdiction over Bridgestone: (1) the Court may impute to Bridgestone for jurisdictional purposes the extensive contacts and actual presence of its subsidiary, Firestone, in the forum, or, in the alternative, Bridgestone's own contacts with the United States sustain the Court's assertion of general jurisdiction; and (2) specific jurisdiction over Bridgestone is appropriate because Plaintiffs' cause of action results from Bridgestone's purposeful contacts with the forum. The Court will examine these two theories in turn.

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[2] Related to this reasoning is Plaintiffs' argument that the Court should assert jurisdiction over Bridgestone based on Plaintiffs' allegation that Bridgestone is liable as the control person of the other Defendants.

1. General Jurisdiction Based on Imputing Firestone's Contacts to Bridgestone and on Bridgestone's Own Contacts

The Court finds Plaintiffs' arguments for asserting jurisdiction over Bridgestone on the basis of its relationship with Firestone unpersuasive. Although the burden of establishing a prima facie case of jurisdiction is relatively slight, *Am. Greetings*, 839 F.2d at 1169, the standard for establishing general jurisdiction still is high, *Humphreys*, 916 F.2d at 1245 (7th Cir. 1990), and Plaintiffs here have failed to meet it.

Plaintiffs base their argument under this theory on Bridgestone's ownership of Firestone, which is subject to the Court's Jurisdiction, and the fact that the companies share certain officers and directors. The Court finds, however, that neither Bridgestone's ownership of Firestone nor the companies' partially overlapping boards and sharing of employees and resources support the assertion of jurisdiction over Bridgestone. "[A] company does not purposefully avail itself merely by owning all or some of a corporation subject to jurisdiction." *Motel 6*, 134 F.3d at 1274 (citing *Hustler Magazine* 465 U.S. 770, 781 n.13; *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)).[3] As a general rule, "a corporate

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[3] *See also Fibreboard*, 710 F.2d at 1159 (citation omitted) (Generally, a foreign parent corporation is not subject to the jurisdiction of a forum . . . merely because its subsidiary is present or doing business there; the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent); *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000) ("constitutional due process requires that personal jurisdiction cannot be premised on corporate affiliation or

parent may provide administrative services for its subsidiary in the ordinary course of business without calling into question the separateness of the two entities for purposes of personal jurisdiction . . . for the [same] general principle that jurisdiction over a parent cannot be based merely on jurisdiction over a subsidiary." *Central States*, 230 F.3d at 945.

Nevertheless, the Court recognizes that "[i]t is well-established that a parent company may be subject to personal jurisdiction in a state where its subsidiary is doing business, provided that the corporate separation is fictitious, the parent has held the subsidiary out as its agent, or the parent has exercised undue control over the subsidiary." *MacDonald v. Navistar Int'l Trans. Corp.*, 143 F. Supp.2d 918, 923-24 (S.D. Ohio 2001) (citing *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964); *see also Esmark v. Nat'l Labor Rel. Bd.*, 887 F.2d 739, 757 (7th Cir. 1989) (parent corporation may be subject to jurisdiction if liable for the acts of a subsidiary, even one separately incorporated, if the parent disregards the separate legal personality of the subsidiary). "The rationale for such an exercise of jurisdiction is that the parent corporation exerts such domination and control over its subsidiary 'that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of

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stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary"); *Newport Components, Inc. v. NEC Home Elecs. (U.S.A.), Inc.*, 1525, 1534 (C.D. Cal. 1987) ("It is firmly established that a non-resident parent corporation is not subject to personal jurisdiction based solely on the independent activities of its wholly-owned subsidiary.").

jurisdiction.'" *Fibreboard*, 710 F.2d at 1159 (citation omitted).

The Court finds none of those factors to be present here. Despite Plaintiffs' allegations, the Court does not find that the facts establish that Bridgestone has disregarded Firestone's separate legal existence, that Bridgestone has held Firestone out as its agent, or that Bridgestone has exercised undue influence over Firestone's management and operations. *Velandra*, 336 F.2d at 296 (whole ownership of subsidiary in forum "represents merely one contact or factor to be considered in assessing the existence or non-existence of the requisite minimum contacts with the [forum], but it is not sufficient of itself to hold the present foreign corporations amenable to personal jurisdiction"). And "[s]o long as the parent corporation and its subsidiary maintain separate and distinct corporate entities, the presence of one in a local forum may not be attributed to the other." *Third Nat'l Bank of Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1093 (6th Cir. 1989) (concurring opinion); *see Canon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335-37 (1925). To be sure, "articulating the type and degree of control necessary to ascribe to a parent the activities of its subsidiary" is difficult. *Fibreboard*, 710 F.2d at 1159 (citation omitted). Nevertheless, according to well-established precedent of both the Supreme Court and the Sixth Circuit, the fact that Bridgestone and Firestone shared certain officers or directors does not establish that Bridgestone exercised undue influence over Firestone or disregarded its separate existence. *See United States v. Bestfoods*, 524 U.S. 51 (1998) ("it is 'normal' for a parent and subsidiary to "have identical directors and officers.'"); *Motel 6*, 134 F.3d at 1275 ("cross-pollination in corporate staffing" is typical of parents and subsidiaries and irrelevant for jurisdictional purposes); *see also Dunn v. A/S Em. Z. Svitzer*, 885 F. Supp. 980, 988

(S.D. Tex. 1995) (overlapping director insufficient to show undue control); *Kramer Motors, Inc. v. British Levland. Ltd.*, 628 F.2d 1175, 1178 (9th Cir. 1980) (foreign parent's mere approval of marketing scheme developed by American subsidiary does not constitute the kind of deliberate forum protection-invoking act that the law requires).

The Court finds that Plaintiffs have not satisfied their burden of making a prima facie showing that Bridgestone has so disregarded Firestone's separate existence as to justify the Court's assertion of jurisdiction on that basis.[4]

In addition to finding that it may not assert general jurisdiction over Bridgestone based on its relationship with Firestone, the Court finds also that Bridgestone's independent contacts with the United States are not sufficiently pervasive to approximate physical presence and, therefore, to justify the Court's assertion of general jurisdiction over Bridgestone. *See Kerry Steel*, 106 F.3d at 149; *Helicopteros Nacionales*, 466 U.S. at 411-414. Thus, the Court turns next to Plaintiffs' argument that specific jurisdiction over Bridgestone exists.

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[4] The Court has taken notice of Judge Sarah E. Barker's denial of Bridgestone's Motion to Dismiss for lack of jurisdiction in a related case, *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, MDL Case No. 1373 (S.D. Ind.). While the Court agrees with Judge Barker's conclusion that jurisdiction exists over Bridgestone in a United States court, the Court is unpersuaded by the portions of Judge Barker's analysis that base the ruling on Bridgestone's ownership of Firestone and its sharing of certain officers and other employees and resources with the subsidiary.

2. Specific Jurisdiction over Bridgestone

Plaintiffs allege as part of their prima facie case for specific jurisdiction that Bridgestone is subject to the securities laws of the United States. Specifically, Plaintiffs allege that in order to trade its ADRs in the United States, Bridgestone must comply with 17 C.F.R. § 240.12g3-2(b)(3), which requires it to furnish the SEC with all documents material to an investment decision. According to Plaintiffs, Bridgestone complied with this requirement in 1993 by furnishing the SEC with information concerning U.S. owners of its ADRs; Bridgestone has not revised this information or submitted a new filing since 1993. Plaintiffs allege, however, that Bridgestone furnished other information to the SEC during the Class Period. In addition, as Plaintiffs point out, Bridgestone's Annual Reports to Shareholders sometimes touted the activities of Firestone and its other subsidiaries as indistinguishable from its own.

The fact that Bridgestone made filings with the SEC, or for that matter obtained a filing exemption from the SEC, shows that the company was concerned with abiding by federal law and obtaining the benefits of acting in the forum. *See In re MDC Holdings Sec. Litig.*, 754 F. Supp. 785, 793 (S.D. Cal. 1990). These facts alone cannot justify the Court's assertion of specific jurisdiction over Bridgestone, however. *Id.* To assert personal jurisdiction over Bridgestone, the Court must "conclude that [Bridgestone] is being brought into court for something that it has done, not for something that [Firestone] has done." *Motel 6*, 134 F.3d at 1274. The Sixth Circuit has indicated that even a prima facie showing that a parent corporation dominated its subsidiary's board is insufficient to establish jurisdiction absent a showing that the parent conducted business or maintained offices in the forum. *Id.* (citation omitted). Without these indicia, purposeful

availment and thus personal jurisdiction are lacking. *Id.* At a minimum, "some overt actions connecting the defendant with the forum" are necessary to establish jurisdiction. *Id.* These contacts need not be extensive in number or duration, since "[e]ven a single purposeful contact may be sufficient to meet the minimum contacts standard when the underlying proceeding is directly related to that contact." *Knowles*, 87 F.3d at 419 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

Bridgestone describes itself as a global entity with regional headquarters in Nashville. Bridgestone stated in Annual Reports during the Class Period that it manufactures tires in Ohio, where Firestone's largest plant is located. Bridgestone also touted in its 1999 Annual Report a new plant in South Carolina. It installed Bridgestone-brand tires on automobiles destined for export to the United States, thus introducing its products into a stream of commerce certain to deliver them to the forum's shores. *See generally Asahi*, 480 U.S. 102 (plurality holding that introducing products into the stream of commerce ending in the United States may satisfy purposeful availment). In its 1999 Annual Report, Bridgestone lauded its Japanese plants' ability to adjust to changing demand worldwide and to increase exports in order to supplement local production in the United States and elsewhere.

In addition, Plaintiffs allege that since 1984, Bridgestone has provided over 100 documents to the SEC, pursuant to 17 C.F.R. § 240.12g3-2 (b) (3), which requires Bridgestone to furnish all information "material to an investment decision." *See generally McNamara v. Bre-X Minerals, Ltd.* 46 F. Supp.2d 628 (E.D. Tex. 1999) (foreign corporation's "SEC filings and other efforts to facilitate over-the-counter trading of its stock in the United States serve as the requisite minimum contacts" for personal jurisdiction). Given these

filings with the SEC, Bridgestone's intentional supply of the forum market with some its tires, its knowledge that many of its other tires were certainly destined for the United States, and its incorporation of the profits from and production of these tires in its own descriptions of itself to investors, the Court finds that the first criterion of the Sixth Circuit's test for personal jurisdiction - purposeful availment of or causing effects in the forum that are not random, fortuitous, or attenuated - is met as to Bridgestone. *WEDGE*, 882 F.2d 1087 (applying *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968)).[5]

The Court finds also that the second criterion for asserting specific jurisdiction over Bridgestone is met: Plaintiffs' cause of action arises from Bridgestone's activities in the forum. *WEDGE*, 882 F.2d at 1091. The Sixth Circuit only requires "the cause of action" to "have a substantial connection with

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[5] The Court is unpersuaded by Defendants' argument that *Motel 6* dictates a different conclusion. 134 F.3d 1269. In that case, as in the district court cases Defendants cite, the relationship between the foreign holding company and the forum was more attenuated than the nexus between Bridgestone and the United States. Although the Court has attempted to make clear that it does not accept Plaintiffs' contentions that the Court may subject Bridgestone to general jurisdiction based on its ownership of Firestone, its generic incorporation of Firestone statistics into its annual reports, or its sharing of personnel with Firestone, *see Velandra*, 336 F.2d at 297 (mere ownership of a subsidiary subject to jurisdiction "is not sufficient of itself to hold . . . foreign corporations amenable to personal jurisdiction"), Bridgestone nevertheless may be subject to the Court's jurisdiction based on its own contacts with the forum. As the Sixth Circuit made clear in *Motel 6*, jurisdiction over a foreign parent corporation is proper when it "is being brought into court for something that it has done, not for something that [its subsidiary] has done." 134 F.3d at 1274.

the defendant's in-state activities." *Id.* (quoting *Southern Mach.*, 401 F.2d at 384 n.27). In this case, Plaintiffs' class action arises not only from Firestone's manufacturing and selling tires, in which it was assisted by Bridgestone, but also from both Bridgestone's sale of its own Bridgestone-branded tires in the forum and from its sale of securities in the United States in the form of ADRs. *See Bre-X*, 46 F. Supp.2d 628 (plaintiffs made "a *prima facie* showing that [foreign defendant], by encouraging over-the-counter trading of its stock in the United States, knew or should have known that it would be amenable to suit in the United States"). The Court finds that the second criterion of the specific jurisdiction test is satisfied.

The final *Southern Machine* requirement is fairness: "the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum . . . to make the exercise of jurisdiction over the defendant reasonable." 401 F.2d at 384. In Bridgestone's case, the Court finds that this requirement is met. The Court's assertion of jurisdiction over Bridgestone's comports with traditional notions of fair play and justice. *See Int'l Shoe*, 326 U.S. at 316. Bridgestone's contacts with the United States and practice of selling its tires and securities in this market, as well as its practice of providing information to the SEC as required by U.S. securities laws, should have provided "fair warning" of the imminently foreseeable possibility that Bridgestone would be subject to jurisdiction in the United States. *See Burger King*, 471 U.S. at 472; *World-Wide Volkswagen*, 444 U.S. at 297; *see also Bre-X*, 46 F. Supp.2d 628 ("the Court cannot seriously entertain the notion that [defendant] Could have made sixty SEC filings without expecting that it would be amenable to United States securities laws").

Having determined it may assert specific jurisdiction over Bridgestone, the Court must determine whether the exercise of jurisdiction would be prudential. While mindful of the "unique" burden of defending in a foreign legal system, *Asahi*, 480 U.S. at 114, and of the great distance that a Japanese Defendant must travel to defend an action in the United States, *Aristech*, 138 F.3d at 628, the Court finds that the forum's interest in ensuring the integrity of its securities laws and the importance to Plaintiffs' potential recovery of including Bridgestone among the Defendants outweigh any burden and inconvenience to Bridgestone. *See Asahi*, 480 U.S. at 113; *Burger King*, 471 U S at 486; *Euroglass*, 107 F.3d at 395. The Court finds it is proper in the instant case to assert specific jurisdiction over Bridgestone on Plaintiff' class action and, therefore, shall dismiss Bridgestone's Motion to Dismiss for lack of jurisdiction.

C. Plaintiffs' Prima Facie Case for Jurisdiction over Kaizaki

1. General Jurisdiction

Plaintiffs' argument for asserting jurisdiction over Kaizaki is based on his contacts with the forum in his capacity as an officer of Firestone and, later, of Bridgestone, and on his alleged control person liability. Plaintiffs contend that Kaizaki is subject to jurisdiction here as a controlling person under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t (a). Plaintiffs cite several cases for the proposition that "control person liability serves as a basis for finding personal jurisdiction." *Bre-X*, 46 F. Supp.2d at 636. This line of reasoning suffers from the defect of putting the cart before the horse, however: Plaintiff still must plead with particularity a claim for control person liability, the first element of which is a primary securities law violation. *Sanders Confectionary*

Prods., Inc. v. Heller Fin., Inc., 973 F.2d 474, 486 (6th Cir. 1992). In the securities fraud context, courts have been almost unanimous in requiring "more than the allegation that [the] defendant controlled the entity which performed the act claimed to have violated the pertinent securities law before asserting jurisdiction over its person." *Baan*, 81 F. Supp.2d at 80. Rather, courts usually permit the assertion of personal jurisdiction only after the plaintiff has made out a prima facie case of control person liability, *Id.* at 80-81 (citations omitted). Because the Court finds that Plaintiffs have failed to state a claim for a securities law violation by any of the Defendants, for reasons detailed below, Plaintiffs cannot possibly have made a prima facie case of control person liability. Hence, the Court cannot assert jurisdiction over Kaizaki on that basis.

Plaintiffs also would base jurisdiction over Kaizaki on three visits he made to the United States during the Class Period, as well as on three "letters to shareholders" that appeared under his name in Bridgestone Annual Reports. This argument too is flawed. A court must examine a defendant's contacts with a forum individually to determine whether the exercise of personal jurisdiction comports with due process. *Ten Mile Indus. Park v. Western Plains Serv. Corp.*, 810 F.2d 1518, 1527 (10th Cir. 1987) (citation omitted). Jurisdiction over an officer or employee of a corporation may not be predicated on jurisdiction over the corporation itself but rather must be based on the individual's contacts with the forum. *See Hustler Magazine*, 465 U.S. at 781 n. 13; *see also Robertson v. AVC Sys., Inc.*, 1995 U.S. App. LEXIS 7862, at *4 (6th Cir. April 5, 1995) ("personal jurisdiction over a corporation entity without more does not confer personal jurisdiction over individual officers and employees of that company") (citations omitted). Plaintiffs cannot predicate jurisdiction over Kaizaki on his visits to the forum on behalf

of Bridgestone as its officer, since those contacts constitute Bridgestone's contacts. *See id.; Ten Mile Indus. Park*, 801 F.2d at 1527. This rule pertains unless the defendant corporate officer is "personally and actively involved in the conduct giving rise to the claim," *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 698 (6th Cir. 2000), in which case, of course, the proper form of jurisdiction that might possibly be asserted would be specific and not general.

Finally, Plaintiffs assert that general jurisdiction exists because Kaizaki lived in the forum between 1991 and 1993. His residence ended five years before the Class Period began and eight years before Plaintiffs filed suit, however. Furthermore, since 1993, Kaizaki has not owned real or personal property in the forum, nor has he engaged in any personal business in the forum. While Kaizaki may be "no stranger to the United States," as Plaintiffs allege, his residence in the forum nearly a decade ago, like his subsequent three visits to the United States on Bridgestone business and efforts on behalf of Bridgestone to market its securities, are too attenuated to justify the Court's assertion of general jurisdiction over him. *See Kerry Steel*, 106 F.3d at 151 (citing *Burger King*, 471 U.S. at 475).

2. Specific Jurisdiction

Plaintiffs allege that Kaizaki is subject to specific jurisdiction in this securities fraud class action, but their conclusory allegations fail to make a prima facie showing. Plaintiffs fail to delineate between Kaizaki and Bridgestone in their jurisdictional analysis; rather, as they do in much of

their Complaint, they treat the two almost interchangeably.[6] The Court does not believe that Plaintiffs have satisfied their obligation to make a prima facie showing that Kaizaki purposefully availed himself in his individual capacity of the benefits and laws of the forum. Plaintiffs also have failed to show that this action arises from Kaizaki's sparse contacts with the forum, the second criterion of the specific jurisdiction analysis. *See Kerry Steel*, 106 F.3d at 151 ("letters on which the plaintiff's claim of jurisdiction primarily depends strike us as precisely the sort of 'random,' 'fortuitous' and 'attenuated' contacts that the *Burger King* Court rejected as a basis for haling non-resident defendants into foreign jurisdictions") (citation omitted); *see also Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985) ("ordinarily the use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the" forum).

Further, even if the Court were to accept Plaintiffs' contentions as to these first two criteria, it would decline to assert personal jurisdiction over Kaizaki under the third criterion, on the grounds that exercising jurisdiction over Kaizaki would be unreasonable and unnecessary. The Court must exercise "great care and reserve . . . when extending

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[6] For example, Plaintiffs' sole argument that the first criterion of the Sixth Circuit test for specific jurisdiction is met is the following: "Here, Bridgestone and Kaizaki had their Annual Reports, press releases and letters to shareholders translated into English . . . and intentionally furnished them to the SEC. There was nothing fortuitous or random about their acts or the consequences of their acts. Bridgestone and Kaizaki purposefully availed themselves of the privilege of acting and causing a consequence in the forum."

our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (citation omitted). Kaizaki is a Japanese citizen, and the Sixth Circuit has indicated that the distance citizens of that country must travel to defend an action in this forum weighs heavily in determining whether the assertion of jurisdiction would comport with traditional notions of fair play. *See Aristech*, 138 F.3d at 628. Finally, although the forum has an interest in enforcing its securities laws and in providing Plaintiffs with an opportunity to recover damages (if warranted), neither interest will be jeopardized by Kaizaki's dismissal from this action for want of jurisdiction. Because Bridgestone, Firestone, and Ono are subject to jurisdiction, no actual violation of securities laws would go unpunished, and any possible recovery Plaintiffs might receive is highly unlikely to be affected by Kaizaki's dismissal.[7]

For the foregoing reasons, the Court shall DISMISS Defendant Kaizaki from this action. The Court will turn next

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[7] Plaintiffs urge the Court to stay its determination on Kaizaki's Motion to Dismiss in order to allow them to conduct discovery on the question of personal jurisdiction. The Court possesses broad discretion in determining whether to permit jurisdictional discovery. When, as here, "the lack of personal jurisdiction is clear, discovery would serve no purpose and should not be permitted." *Kelly v. Syria Shell Petroleum Dev. B. V.*, 213 F.3d 841, 856 (5th Cir. 2000) (citation omitted). Further, "[f]oreign nationals usually should not be subject to extensive discovery in order to determine whether personal jurisdiction over them exists." *Central States*, 230 F.3d at 946 (7th Cir. 2000) (citation omitted). Because it believes Plaintiffs have failed to make a prima facie showing of personal jurisdiction over Kaizaki, and because further discovery would be unwarranted, the Court declines to stay its determination.

to Plaintiffs' claims against Defendants Bridgestone, Firestone, and Ono.

IV. APPLICABLE PLEADING STANDARDS FOR PLAINTIFFS' CLAIMS

Plaintiffs allege that Defendants violated Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1994), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1999), promulgated thereunder. Plaintiffs further allege that Bridgestone, Firestone, and Kaizaki are liable as controlling persons under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a) (1994), and therefore are individually liable for Bridgestone's and Firestone's alleged violations of Section 10(b) and Rule 10b-5: Bridgestone as a controlling person of all Defendants, Firestone as the controlling person of Ono, and Kaizaki as the controlling person of Bridgestone and hence Firestone.

A. Rule 12 (b) (6)

Both Plaintiffs and Defendants have attached documents outside the pleadings. Normally, this would lead the Court to convert Defendants' motions to dismiss to motions for summary judgment. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 98 (6th Cir. 1997) (generally, "matters outside the pleadings are not to be considered by the court in ruling on a 12(b)(6) motion to dismiss"). In a securities fraud case, however, the Sixth Circuit has instructed district courts to consider the full text of SEC filings, the company prospectus, analysts' reports, and statements integral to a complaint, even if not attached to the complaint, without converting a motion to dismiss. *In re Credit Acceptance Corp., Sec. Litig.*, 50 F. Supp.2d 662, 669 (E.D. Mich. 1999) (citation omitted). Further, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are

referred to in the plaintiff's complaint and are central to [the plaintiff's] claim." *Weiner*, 108 F.3d at 89. Thus, despite the parties' attachments, the Court shall not convert Defendants' motions.

It is well settled that a court's task in analyzing the sufficiency of a complaint for the purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is necessarily narrow and limited. *See Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). The issue is not whether a claim ultimately will prevail, but "whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, (1974)). Moreover, in reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, a court must review the complaint in the light most favorable to the non-moving party, construing all of its allegations in her favor. *See Skees v. United States*, 107 F.3d 421, 423 (6th Cir. 1997) (citations omitted). A complaint should not be dismissed under Rule 12 (b) (6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer*, 416 U.S. at 236 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also G.M. Eng'rs and Assoca. v. West Bloomfield Township*, 922 F.2d 328, 330 (6th Cir. 1990).

B. Rule 9(b)

In an action for fraud, Federal Rule 9(b) of Civil Procedure requires plaintiffs to state "with particularity" the circumstances constituting fraud. The Sixth Circuit has ruled that the notice pleading provisions of Rule 8 and the requirements of Rule 9(b) of the Federal Rules of Civil

Procedure are to be read in conjunction with each other. *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988). As the Sixth Circuit has explained, the Rule 9(b) requirement that plaintiffs plead fraud with particularity "is designed to allow the District Court to distinguish valid from invalid claims . . . and to terminate needless litigation early in the proceedings." *Blount Fin. Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir. 1987).

To satisfy Rule 9(b), "a plaintiff must at a minimum allege the time, place and contents of the misrepresentations upon which [the plaintiff] relied." *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). Further, where a plaintiff alleges fraud against multiple defendants, the plaintiff must separately plead with particularity the alleged fraudulent conduct of each defendant to satisfy Rule 9(b). *Benoav v. Decker*, 517 F. Supp. 490, 493 (E.D. Mich. 1981), *aff'd* 735 F.2d 1363 (6th Cir. 1984). Thus, under Rule 9(b), "Plaintiffs are forbidden from 'group[ing] defendants together without specifying which defendant committed which wrong.'" *In re First Union Corp. Sec. Litig.*, 128 F. Supp.2d 871, 884 (W.D.N.C. 2001) (citation omitted).

The purpose of Rule 9 is three-fold: (1) it provides defendants with fair notice of the claims against them, (2) it protects defendants from unfounded allegations of fraud, and (3) it discourages strike suits and fishing expeditions on discovery. *In re Credit Acceptance Corp. Sec. Litig.*, 50 F. Supp.2d 662, 671 (E.D. Mich. 1999) (citation omitted). Nevertheless, because it believed Rule 9(b)'s heightened pleading requirement was not sufficiently stringent to curb private litigants' abuses of the securities laws, Congress in 1995 passed the Private Securities Litigation Reform Act (the "Reform Act"), 15 U.S.C. § 78u-4 (2001), to create uniform

pleading standards in securities fraud actions and to curtail frivolous lawsuits. *Id.; see also Helwig v. Vencor*, 251 F.3d 540, 547-49 (6th Cir. 2001) (en banc).

C. The Reform Act

Congress enacted the Reform Act to further heighten and clarify the pleading requirements for securities fraud. *Credit Acceptance*, 50 F. Supp.2d at 671. Unlike under Rule 12(b)(6), a plaintiff in a securities fraud action does not get the benefit of all reasonable inferences but rather is "entitled only to the most plausible of competing inferences." *Vencor*, 251 F.3d at 553. To be sure, "the Reform Act did not reverse the polarity of securities pleading," and the Sixth Circuit's "willingness to draw inferences in favor of the plaintiff remains unchanged by the PSLRA." *Id.* Nevertheless, "Congress unquestionably strengthened the pleading standard for securities fraud," *Id.*, and courts have interpreted the Reform Act as constructively establishing "a presumption of correct management." *In re Ford Motor Co. Sec. Litig.*, 184 F. Supp.2d 626, 630 (E.D. Mich. 2001).

Under the Reform Act, plaintiffs now must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Vencor*, 251 F. 3d at 549 (citing 15 U.S.C. § 78u-4(b)(2)). To prevail under the Reform Act's heightened pleading standard, a plaintiff need not foreclose all other possible characterizations of fact: "[r]ather, the 'strong inference' requirement means that plaintiffs are entitled only to the most plausible of competing inferences." *Id.* at 553. (emphasis added). The heightened standard significantly strengthened the pre-Reform Act standard, which gave a plaintiff the benefit of all reasonable inferences. *Id.* (citations omitted) (emphasis added); *see also Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 621

(4th Cir. 1999) (the Reform Act "indisputably seeks to make pleading scienter more difficult for plaintiffs").

V. FACTS THAT PLAINTIFFS ALLEGE CONSTITUTE SECURITIES FRAUD

Viewed in the light most favorable to Plaintiff, as the Court must, the relevant facts and circumstances giving rise to this cause of action are as follows:

A. Events Preceding the Class Period

Ford introduced the Explorer in 1990, with the Firestone ATX as the vehicle's standard tire. Ford sold over 300,000 Explorers each year. The vehicle's success resulted in high revenues for Firestone[8] as well. Consumers first complained of tire failure on ATX-equipped Explorers in 1992. Based on these claims, Firestone began to monitor and investigate tire tread problems in 1993. By 1999, Plaintiffs claim, at least 50

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[8] Throughout the Complaint, Plaintiffs fail to distinguish clearly Bridgestone and Firestone. Firestone is an Ohio corporation and, although it is a wholly-owned subsidiary of Bridgestone, the two companies are separately managed. In 1988, Bridgestone acquired all of the stock of the former Firestone Tire & Rubber company. Firestone thereafter relocated its headquarters from Ohio to Nashville. Firestone manufactures tires in several plants in the U.S. for sale as original equipment on new vehicles and as replacement tires.

Defendant Ono was the Executive Vice President of Bridgestone and Chairman and CEO of Firestone until he resigned those positions in October 2000. Plaintiffs allege that Ono participated in the allegedly fraudulent conduct of which they complain and thus is liable under Section 10(b) and Rule 10b-5.

product liability lawsuits had been filed against Bridgestone and Firestone. A dispute between Firestone and the union representing its workers from 1994-96 resulted in a strike during that time at its United States production facilities. Plaintiffs allege that as a result of this labor dispute and strike, quality-control at Firestone's plants declined, which in turn resulted in a higher-than-normal number of defective tires being manufactured and sold.

Plaintiffs allege that in 1996, Defendants reached a secret agreement with State Farm Insurance company to reimburse the insurer for claims resulting from automobile accidents attributable to Firestone tire failures. Plaintiffs allege also that warranty, property damage, and injury claims involving Firestone tires began increasing in 1996.

In 1997, Plaintiffs claim, top Firestone executives began holding periodic meetings to discuss tread separation on ATX tires. Also beginning that year, Firestone received reports of accidents in the Middle East and Venezuela that may have resulted from Firestone tire failures. Plaintiffs allege that in 1998, Defendants decided against a recall of Firestone tires in those regions in order to avoid the publicity a recall would have spawned. In particular, Plaintiffs allege that Defendants decided against recalling the tires in order to avoid notifying the United States Department of Transportation about the recall.

B. Defendants' Statements Preceding the Class Period

Bridgestone's Annual Report for 1996 contained a letter to shareholders from Defendant Kaizaki praising the company's record earnings for the year and the company's industry-leading share of the world tire market. Mr. Kaizaki also cited as cause for confidence the company's agreement

with the Firestone workers' union that ended their strikes at Firestone plants. Specifically, Mr. Kaizaki's letter praised Bridgestone tires as "the best tires in the world," and assured shareholders of continuing advances in "enhancing safety and improving performance." Also, Bridgestone's 1997 Annual Report contained the following statement from Defendant Kaizaki, which Plaintiffs allege was false: "Rigorous testing under the diverse conditions at our proving grounds around the world helps ensure reliable quality for original equipment . . . customers."

C. Defendants' Statements and Events during the Class Period

Plaintiffs allege that during the Class Period, Defendants conspired to conceal information indicating defects in Firestone's tires, including Firestone's internal data on tire failures, its settlement of personal injury lawsuits, and its reimbursement of State Farm and individual claimants.

Bridgestone's 1998 and 1999 AnnualReports contained statements by Mr. Kaizaki of confidence in Bridgestone's products and its future. These general statements of confidence were similar to the statements made in the 1996 and 1997 Annual Reports.

On February 4, 2000, in response to a negative story broadcast by a Houston, Texas, television station, Firestone issued a press release stating the following:

> We . . . take great pride in the quality and durability of our products and we stand behind all of them. . . . [W]e have full confidence in the performance of our Firestone Radial ATX tires . . . . Our experience with the Radial ATX indicates high consumer satisfaction

> with the quality and reliability of these tires. . . . We monitor the performance of all of our tires and . . . have full confidence in them.

In May 2000, the National Highway Transportation Safety Administration ("NHTSA") began to investigate alleged failures of Firestone tires, including reports of tread separation on tires installed on the Ford Explorer.

On July 26, 2000, after two lawsuits were filed against Firestone alleging that tire tread separation caused Ford Explorers to roll-over, resulting in fatalities, Firestone told The Wall Street Journal that it had "full confidence" in the tires. On August 1, 2000, Firestone issued the following statement: "We continually monitor the performance of all our lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires." the company stated that its tires "are among the safest tires on the road today." Two days later, in response to charges of tire defects, a Firestone spokeswoman asserted the company's tires were safe. However, on August 9, 2000, Firestone announced a recall of over 6.5 million tires and replaced all tires on unsold Explorers in inventory.

D. Defendants' Accounting Practices

Plaintiffs allege that Defendants engaged in fraudulent accounting practices during the class period, which artificially inflated the price of Bridgestone stock and ADRs. Specifically, Plaintiffs allege Bridgestone issued financial statements that were made false by the failure to include loss contingencies that Defendants "had incurred by selling what they knew by 1996 to be defective tires." According to Plaintiffs, Defendants should have calculated the prospective liability for selling possibly defective tires and included that

liability in the Contingent Liabilities section of Bridgestone's financial statements. Plaintiffs allege that Bridgestone's financial statements for 1997-99 were false and misleading when made, based on Defendants' alleged knowledge, and that the statements violated Generally Accepted Accounting Principles ("GAAP").

E. Defendants' Statements and Events after the Class Period

In September 2000, Firestone CEO John Lampe told Congress that the company had made "some bad tires." Lampe also stated after the Class Period, "It's very, very evident there was something going on in Decatur that caused this." Defendant Kaizaki stated that he wished Bridgestone had applied its "standards to things like technology and quality assurance." In December 2000, Firestone released a report of its internal investigation into ATX tires. According to news stories at the time, the Firestone report concluded that the company made mistakes in designing and manufacturing certain elements of the tires. Many of the defects stemmed from undetected problems with the machinery at Firestone's Decatur, Illinois, plant, where the majority of the Company's tires are made.

On February 22, 2001, Bridgestone reported that its profits fell 80 percent in 2000, largely as a result of the Firestone tire recall, which resulted in a $510 million loss for the year at the subsidiary. The recall cost Bridgestone $754 million. Bridgestone's 2000 earnings were its lowest in a decade.

VI. ANALYSIS OF PLAINTIFFS' CLAIMS FOR SECURITIES FRAUD

Count I of the Complaint alleges that all Defendants made misleading statements and omissions in violation of Section 10 (b) of the Exchange Act, 15 U.S.C. § 78j(b), and of Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5. In Count II of the Complaint, Plaintiffs allege that Bridgestone and Firestone violated Section 20(a) of the Exchange Act, 15 U.S.C. § 78t (a), on the theory that Bridgestone controlled the other Defendants and that Firestone controlled Defendant Ono.[9]

A. Count I: Plaintiffs' Section 10(b) and Rule 10b-5 Claims

To state a claim under Section 10(b) of the Exchange Act and Rule 10b-5, a plaintiff must allege, in connection with the purchase or sale of securities, (1) the misstatement or omission of a material fact, (2) made with scienter, (3) upon which the plaintiff justifiably relied and (4) which proximately caused the plaintiff's injury. *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 548 (6th Cir. 1999) (citation omitted). Under Federal Rule 9(b) of Civil Procedure and the Reform Act, Plaintiff must plead each of these elements with sufficient particularity as to each Defendant to survive Defendants' Motions to Dismiss.

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[9] Plaintiffs allege that Defendant Kaizaki is liable under both these provisions of the federal securities laws, but because the court lacks jurisdiction over him, it will omit him from its analysis.

1. Bridgestone's Alleged Violations of Rule 10-b-5

Under Rule 9(b) and the Reform Act, Plaintiffs must plead with particularity the alleged fraudulent statements or omissions of each Defendant and "may not rely upon blanket references to acts or omissions by all of the defendants." *Envoy*, 133 F. Supp.2d at 659 (citations omitted). Congress has required that a complaint alleging securities fraud "shall specify each statement alleged to have been misleading . . . [and] the reason or reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1). Courts applying the Reform Act have held that a plaintiff may not satisfy its heightened pleading burden "on the basis of the general flavor derived from an issuer's collective statements over a long period of time." *First Union*, 128 F. Supp.2d at 886 (citations omitted). Rather, "to survive a motion to dismiss, a complaint must withstand an exacting statement-by-statement analysis." *Id.*

a. Bridgestone's Alleged Omissions

Plaintiffs assert that Bridgestone had a duty to disclose the possibility that Firestone's tires were defective and would have to be recalled. Federal securities laws generally do not require a company to disclose omitted information, however, even when the information is material. *In re Sofamor Danek Group, Inc. Sec. Litig.*, 123 F. 3d 394, 400 (6th Cir. 1997); *see also Starkman v. Marathon Oil Co.*, 772 F.2d 231, 238 (6th Cir. 1985) ("a 'duty to speak' must exist before the disclosure of material facts is required under rule 10b-5"). Moreover, an affirmative duty of disclosure "does not arise from the mere possession of nonpublic market information." *Chiarella v. United States*, 445 U.S. 222, 235 (1980). As the Sixth Circuit has held, "[b]efore liability for non-disclosure can attach, the defendant must have violated an affirmative duty of disclosure . . . . Materiality alone is not sufficient to

place a company under a duty of disclosure." *Sofamor Danek*, 123 F.3d at 400 ("most matters of opinion[] simply do not come within the duty of disclosure"). This well-settled rule is followed by other circuits, *see In re Time Warner, Inc. Sec. Litig.*, 99 F.3d 259, 267 (2d Cir. 1993) (company not "required to disclose a fact merely because a reasonable investor would very much like to know that fact"); *In re Northern Telecom. Ltd. Sec. Litig.*, 116 F. Supp.2d at 459 (company not "generally obligated to disclose internal problems merely because those problems [are] potentially significant"), and has been affirmed by the Supreme Court. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 239, n.17 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5.").

In the Sixth Circuit, a company is not required to disclose internal predictions unless the event predicted is "substantially certain" to occur. *Sofamor Danek*, 123 F.3d at 402; *see also Starkman*, 772 F.2d at 241 (soft information must be "virtually as certain as hard facts" before disclosure is required). The Sixth Circuit has rejected a more stringent duty of disclosure on the grounds that "[s]uch a rule would deluge investors with marginally useful information, and would damage corporations' legitimate needs to keep some information non-public." *Sofamor Danek*, 123 F. 3d at 403 (citation omitted). This approach is consistent with that applied by the Supreme Court. *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976) (requiring company to disclose all potentially material information would "bury the shareholder in an avalanche of trivial information - a result that is hardly conducive to informed decisionmaking").

In the instant case, Plaintiffs have failed to make a prima facie showing that Bridgestone knew to a "substantial certain[ty]" that Firestone's tires were defective. Bridgestone

was under no duty to speculate about potential problems with its subsidiary's tires that were not yet known. *See In re Carter Wallace, Inc. Sec. Litig.*, 220 F.3d 36, 42 (2d Cir. 2000) ("*Carter-Wallace II*"). Bridgestone's expressions of general confidence in it and its subsidiaries' products and its optimism about the future are insufficiently specific to have engendered any duty to disclose further information.[10] Plaintiffs fail to plead with sufficient particularity an omission theory of liability.

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[10] The following statements by Bridgestone and Kaizaki are representative of those which Plaintiffs allege constitute affirmative misrepresentations:

(1) We are the largest tire supplier to Ford Motor and also are a leading supplier to General Motors and to the largest European automakers. Our global market share in original equipment tires increased further in 1998. That growth evidences high regard among automakers for our strengths in product quality. . . .

(2) Rigorous testing under diverse conditions at our proving grounds around the world helps ensure reliable quality. . . .

(3) Our pledge to consumers is to deliver world-class quality in every tire we manufacture everywhere in the world. We make good on that pledge every day at 39 tire plants and 46 non-tire plants on six continents.

(4) In the Americas, our multibrand strategy - centered on the Bridgestone, Firestone, and Dayton brands - has produced sales growth that has averaged nearly $500 million a year since 1993.

(5) We are making steady progress toward leadership in the world tire industry. . . . Sales at our subsidiary for the Americas, Bridgestone/Firestone, Inc. surpassed our parent-company turnover for the first time.

(6) Bridgestone today is better positioned than ever to maintain sound margins in any kind of market environment.

b. Bridgestone's Alleged Accounting Violations

Plaintiffs allege that Bridgestone's financial statements during the Class Period were fraudulent because they failed to include an "enormous loss contingency" for contingent liabilities stemming from the Firestone tire recall. Plaintiffs allege this omission violated United States and Japanese GAAP, as well as SEC rules. The Court rejects this theory.

First, because Bridgestone stock does not trade on any American exchange and the company does not file its financial statements with the SEC, it is not required to follow United States GAAP. *See* SEC Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b); SEC Regulation S-X, 12 C.F.R. § 210.4-01(a)(1). Bridgestone's Annual Reports clearly state that the financial statements were prepared according to Japanese GAAP, as Plaintiffs themselves concede. Plaintiffs have failed to plead a single fact that would have caused a reasonable investor to believe that Bridgestone's financial statements were prepared according to United States GAAP, or that a reasonable investor would have relied on this belief. Nor have Plaintiffs plead any particular fact that could establish any inference that Bridgestone violated Japanese GAAP. Further, even if Bridgestone were subject to United States GAAP, Plaintiffs have failed to plead with particularity any facts establishing a strong inference that Bridgestone should have "considered probable" a Firestone recall and thus established a huge contingent liabilities fund. *See* Financial Accounting Standards Board Statement No. 5. Rather, Plaintiffs have "simply seized upon disclosures made in later . . . reports and alleged that they should have been made in earlier ones." *Denny v. Barber*, 576 F.2d 465, 469 (2d Cir. 1978); *see also DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1978) ("No matter when [defendant creates a contingent reserve], someone may say that it should have acted sooner"). The

Court finds that Plaintiffs' argument that Bridgestone's financial statements were false or misleading is without merit.

c. Bridgestone's Soft Statements

Bridgestone's "soft" statements of confidence and self-praise do not constitute actionable misstatements.[11] As this Court has stated, a statement of opinion is not a material fact and thus is not actionable under Rule 10b-5. *Morse v. McWhorter*, 1998 U.S. Dist. LEXIS 19053, at *89-90 (M. D. Tenn. June 20, 1998). In a securities fraud action, plaintiffs must prove that defendants made "false statement[s] or omission[s] of material fact." *In re Int'l Bus. Machs. Corp. Sec. Litig.*, 163 F.3d 102 (2d Cir. 1998). A statement or omission is material only if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32 (quoting *TSC*, 426 U.S. at 449). In particular, optimistic or laudatory statements by company officers do not rise to the level of materiality, since corporations are expected to make such statements, and reasonable investors do not make investment decisions based on such puffery. *See Sofamor Danek*, 123 F.3d at 400; *Glassman v. Computervision Corp.*, 90 F.3d 617, 635-36 (1st Cir. 1996); *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 289-90 (4th Cir. 1993); *Northern Telecom*, 116 F. Supp.2d at 466.

Although the question of materiality generally is reserved for the trier of facts, "if the alleged misrepresentations or

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[11] "'Soft' information . . . includes predictions and matters of opinion," in contrast with "factual information that is objectively verifiable." *Sofamor Danek*, 123 F. 3d at 401 (citation omitted).

omissions are so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality," it is appropriate for a district court to rule that the alleged misstatements are not actionable as a matter of law. *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 281 n. 11 (3d Cir. 1992). In particular, courts have "demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace – loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available." *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1217, (1st Cir. 1996) (footnote omitted); *see also In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 538-39 (3d Cir. 1999) (statements that "express confidence" in the company's future earnings prospects are not actionable as a matter of law). In short, reasonable investors expect corporate managers "to be confident about their stewardship and the prospects of the business that they manage," and therefore such statements, without more, usually are immaterial. *Shields v. Citytrust Bancorp.*, 25 F.3d 1124, 1129-30 (2d Cir. 1994); *see also Raab*, 4 F.3d at 290 ("[p]rojections of future performance not worded as guarantees are generally not actionable under the federal" securities laws.").

Courts have found statements nearly identical to those made by Bridgestone clearly to be inactionable. *See Fitzer v. Security Dynamics Techs.*, 119 F. Supp.2d 12, 23 (D. Mass. 2000) ("the corporate puffery rule applies to loose optimism about both a company's current state of affairs and its future prospects" - for example, statements that the company is "well positioned" *Cicione v. Gorr*, 843 F. Supp. 1199, 1205 (N.D. Ohio 1994) (statements by defendant that "[w]e expect

our growth in sales and profitability to continue," "[w]e anticipate continued strong demand," and "we're well positioned for long-term growth" are immaterial). The Court finds that Bridgestone's statements of self-praise and confidence in its future constituted immaterial opinions and cannot form the basis for a 10b-5 claim; therefore, the Court will not examine Bridgestone's scienter as to those claims.[12]

d. Bridgestone's Hard Statements

Plaintiffs allege that Bridgestone's statements about earnings, sales, and market share in its Annual Reports from 1996 to 1999 were false or misleading. These statements comprise "hard" facts[13] that are "objectively verifiable."

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[12] The Court distinguishes Bridgestone's statements from those found actionable in *Vencor*. 251 F.3d 540. In *Vencor*, the defendant stated it was "comfortable" with specific earnings projections made by analysts, despite the fact that the negative impact of federal legislation on its business "had become fixed and . . . measurable." *Id.* at 557. Bridgestone, by contrast, made no earnings projections, nor was the impact of the Firestone tire recall "fixed and . . . measurable" at the time of the Defendants' statements. Contrary to their professed ignorance of the legislation's effect and statements that they were comfortable with increased earnings projections, Vencor executives engaged in insider trading and warned employees that the legislation would "make it difficult for Vencor to make money and stay profitable." *Id.* at 557. Here, in contrast, Plaintiffs have failed to allege a single fact producing any inference that Bridgestone or Firestone executives engaged in insider trading to dump their shares or warned employees about impending hard times while simultaneously expressing publicly confidence in the companies' products and futures.

[13] Hard information 'is typically historical information or other factual information that is objectively verifiable . . . ."

Sofamor Danek, 123 F.3d at 401. As such, they could constitute actionable securities fraud if Plaintiffs were to show the elements of a Rule 10b-5 claim. For a hard fact to be actionable, a securities fraud plaintiff must plead with particularity why the statements were false or misleading at the time they were made. Here, however, Plaintiffs allege no facts to show that Bridgestone's "hard" statements were fraudulent. Nothing in the Complaint indicates that Bridgestone's earnings and sales projections were objectively false or misleading at the time they were made. Nor do Plaintiffs show that subsequent events – namely, the Firestone recall - have proved Bridgestone's projections false. Even if they had, "[t]o be actionable, a statement or omission must have been misleading at the time it was made; liability cannot be imposed on the basis of subsequent events." *In re NAHC, Inc. Sec. Litig.*, 2001 WL 1241007, at *11 (E.D. Pa. Oct. 17, 2001) (citing *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000)).

Thus, unless Plaintiffs plead with particularity why Bridgestone's projections and other verifiable statements were subjectively false or misleading when made – i.e., that Bridgestone possessed scienter as required by the Reform Act – those statements cannot provide the basis for a Rule 10b-5 claim against Defendants. *See Sofamor Danek*, 123 F.3d at 401. The Court will examine the second element of Plaintiffs' Rule 10b-5 claim against Bridgestone – scienter.

Sofamor Danek, 123 F.3d at 402 (quoting *Garcia v. Cordova*, 930 F.2d 826, 830 (10th Cir. 1991)). "Such information is to be contrasted with 'soft' information, which includes predictions and matters of opinion." *Id.* (citation omitted).

2. Bridgestone's Alleged Scienter

Although the Court does not believe that any of Bridgestone's or Firestone's statements or omissions are material and actionable, it will assume for this analysis that at least one of Bridgestone's "hard" statements and Firestone's statement referencing "objective" data might be construed to be sufficiently specific and objective to be actionable, if Plaintiffs allege with particularity the other necessary elements of Rule 10b-5 claim. Therefore, the Court will consider whether Plaintiffs have alleged scienter as to Bridgestone and Firestone.

The Reform Act "indisputably seeks to make pleading scienter more difficult for plaintiffs." *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 621 (4th Cir. 1999). Applying this principle to specific cases, however, courts have disagreed over how stringently Congress intended the Reform Act's heightened pleading standard to be interpreted. *See Vencor*, 251 F.3d at 549. Nevertheless, "there is no disagreement on one critical point: the Reform Act imposes a stricter standard than was previously employed." *First Union*, 128 F. Supp.2d at 885. "At a minimum," that standard imposes the pre-Reform Act pleading requirement of the Second Circuit, which was the most stringent at the time. *Id.* The Second Circuit's standard required securities fraud plaintiffs to plead either facts establishing a motive to commit fraud and an opportunity to do so, or facts constituting circumstantial evidence of either conscious or reckless behavior. *See Time Warner*, 9 F.3d at 269; *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2nd Cir. 1995). According to the Second Circuit, a securities fraud plaintiff could establish a defendant's motive by alleging with particularity that the defendant "benefitted in some concrete and personal way from the purported fraud. This requirement was generally met when corporate insiders

were alleged to have misrepresented to the public material facts . . . in order to keep the stock price artificially high while they sold their own shares at a profit." *Novak v. Kasaks*, 216 F.3d 300, 307-08 (2nd Cir. 2000).

The Sixth Circuit has noted, "although the Reform Act drew heavily on Second Circuit case law in fashioning the 'strong inference' standard, Congress stated it did not intend to codify how that standard should be met." *Vencor*, 251 F.3d at 548; *Comshare*, 183 F.3d at 549 (Congress did not define "state of mind" when it passed the Reform Act). "It is clear," though, "that some form of fraudulent intent is required." *Vencor*, 251 F.3d at 549. Even before passage of the Reform Act, the Supreme Court held that plaintiffs in securities fraud cases must show that defendants made misrepresentations or omissions with the "intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 advent (1976). In *Ernst & Ernst*, decided twenty years before the advent of the Reform Act, the Court held, because the Exchange Act "speaks so specifically in terms of manipulation and deception," proof of negligent conduct is insufficient to establish liability. *Id.* at 214; *see also Advanta*, 180 F.3d at 539 (even "inexcusable negligence" is insufficient to establish scienter).

Since *Ernst & Ernst*, the Supreme Court has not defined scienter more specifically. The Sixth Circuit, however, has provided guidance on this issue: it has "long premised liability [for securities fraud] on at least 'reckless' behavior." *Vencor*, 251 F.3d at 548 (citation omitted). In its first case to interpret the new pleading standard for securities fraud litigation under the Reform Act, the Court of Appeals held that Congress "did not change the scienter that a plaintiff must prove to prevail in a securities fraud case but instead changed what a plaintiff must plead in his complaint in order to

survive a motion to dismiss." *Comshare*, 183 F.3d at 548-49. Thus, in this case, as in virtually all securities fraud cases, the Court "confront[s] not what constitutes scienter but rather what produces a 'strong inference that the defendant acted with the required state of mind.'" *Vencor*, 251 F.3d at 548 (quoting 15 U.S.C. § 78u-4(b)(2)). When it passed the Reform Act, "Congress deliberately left this question unanswered." *Id.*

The court's analysis must focus on whether the facts as pled produce a strong inference that the Defendants acted at least recklessly. *Ford*, 184 F. Supp 2d at 630 (citing *Vencor* 251 F.3d at 551). The Court of Appeals has defined "recklessness" as "'highly unreasonable conduct which is an extreme departure from the standards of ordinary care. While the danger need not be known, it must at least be so obvious that any reasonable man would have known of it." *Comshare*, 183 F.3d at 550 (citing *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1025 (6th Cir. 1979).

Plaintiffs allege that Defendants knew the recall was inevitable, and therefore that the companies were at least reckless in continuing to defend the Firestone tires. Plaintiffs base this contention on the fact that .06 percent of the tires produced at Firestone's Ohio facility were defective and on such alleged warning signs as the warranty claims and lawsuits filed in the United States and abroad. According to Plaintiffs' theory, these facts create a strong inference of scienter, and therefore establish that Defendant's expressions of "full confidence" in their products were materially false and misleading when made.

The Court finds that Plaintiff' argument is not the "most plausible of competing inferences" to be drawn from the facts. *Vencor*, 251 F.3d at 553. Plaintiff contend that *Vencor*

supports their theory of scienter and materiality. The Court disagrees. Bridgestone's and Firestone's statements and the facts of this case bear little resemblance to those found actionable in *Vencor*. 251 F.3d at 557. In *Vencor*, the defendant stated it was "comfortable" with specific earnings projections made by analysts, despite the fact that the negative impact of federal legislation on its business 'had become fixed and . . . measurable." *Id.* Bridgestone, by contrast, made no earnings projections, nor was the impact of the Firestone tire recall "fixed and . . . measurable" at the time of the Defendants' statements. Contrary to their professed ignorance of the legislation's effect and statements that they were comfortable with increased earnings projections, Vencor executives engaged in insider trading and warned employees that the legislation would "make it difficult for Vencor to make money and stay profitable." *Id.* Here, in contrast, Plaintiffs have failed to allege a single fact producing an inference that Bridgestone or Firestone executives engaged in insider trading to dump their shares or warned employees about impending hard times while publicly expressing confidence in the companies' products and futures. The absence of such facts supports no inference of actual knowledge, much less the most plausible of competing inferences.

Nor does the Court find that Bridgestone or Firestone was at least reckless in affirming confidence in the tires. Plaintiffs base this argument largely on the lawsuits and claims that stemmed from Firestone tire tread separation problems. These facts cannot support an inference of scienter, however, since "actual awareness of adverse reports while touting safety does not, on its own, constitute 'strong circumstantial evidence of conscious misbehavior or recklessness.'" *Carter-Wallace II*, 220 F.3d at 42 (citation omitted) (emphasis added). To plead scienter based on Defendants' possession of this data,

Plaintiffs must established a definitive causal connection between the tires and the reported accidents and alleged product failures. *Oran*, 226 F.3d at 284. This link must be so strong that the failures cannot be attributed to other factors and that they would affect future earnings. *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 157 (2d Cir. 1998) ("*Carter-Wallace I*") Further, even at the motion to dismiss stage, "there can be no presumption that [Defendant] was aware of a statistically significant connection between" the product and the reported problems. *Carter-Wallace II*, 220 F.3d at 42.

Plaintiffs fail to plead facts sufficient to support a strong inference of scienter. Viewed in the light most favorable to Plaintiffs, 99.94 percent of the tires produced at Firestone's Decatur plant did not experience tread separation. Further, Plaintiffs cite no facts to dispel the still-unresolved possibility that other factors than latent defects produced tread separation and rollover problems. Indeed, Plaintiffs' Complaint quotes a letter from Bridgestone/Firestone Venezuela stating its refusal to participate in a tire replacement program, on the grounds that it believed the rollover accidents were caused by the Ford Explorer's suspension. The most plausible inference to be drawn from this document is that Firestone believed its tires were safe and that the accidents were attributable to other factors.

The Court also does not find that a strong inference of recklessness by Defendants is warranted. While recklessness is sufficient to establish the state of mind required of the scienter element in a securities fraud claim, *Vencor*, 251 F. 3d at 548, Plaintiffs must show "'highly unreasonable conduct . . . [disregarding a danger] so obvious that any reasonable many would have known of it.'" *Comshare*, 183 F.3d at 550 (quoting *Mansbach*, 598 F.2d at 1025). Far from being

obvious that Firestone tires are to blame for the Explorer accidents, it remains ambiguous today whether the tires or the Explorer, or some combination of the two, is to blame. NHTSA spent over a year studying the problem before concluding that some but perhaps not all of the Firestone tires may have been responsible.

Because Plaintiffs have failed to allege facts to show a definitive causal connection between the Firestone tires and tread separation problems or accidents, they have failed to produce a strong inference that Bridgestone or Firestone knew of or recklessly disregarded the existence of tire defects that rendered their statements false or misleading.

3. Firestone's Alleged Misstatements and Omissions

Plaintiffs' complaint cites four specific statements made by Firestone during the Class Period. The remainder of the statements that Plaintiffs allege constituted fraudulent misrepresentations were made by Bridgestone or Kaizaki in Bridgestone's Annual Reports. Because Plaintiffs must plead separately and with particularity the allegedly fraudulent conduct of each defendant, *Envoy*, 133 F. Supp.2d at 659, the Court will not consider those statements in its analysis of Firestone's potential liability.[14] Plaintiffs would have the Court attribute these additional statements to Firestone, on the theory that Firestone issued them along with Bridgestone. A subsidiary is not liable for its parent's statements merely by virtue of the relationship, however. *See Lindblom v. Mobile Telecomms. Techs.*, 985 F. Supp. 161, 163 (D.D.C. 1997). Indeed, even if Firestone had assisted Bridgestone to

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[14] Further, the Court already has found those statements to be immaterial as a matter of law.

distribute the Annual Reports containing Bridgestone's alleged misstatements, Firestone must actually have made the statements to be liable: "[a]nything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b)." *Wright v. Ernst & Young LLP*, 152 F.3d 169, 174-75 (2d Cir. 1998) (citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)). Thus, the Court will not attribute Bridgestone's statements to Firestone, and it will consider only the four specifically-cited Firestone statements to determine whether Plaintiffs have stated a claim of securities fraud against Firestone under the heightened pleading standards of Federal Rule of Civil Procedure 9(b) and the Reform Act.

Following are the four statements (and the circumstances in which they were made) upon which Plaintiffs base their claim for Firestone's violation of Rule 10b-5: (1) In February 2000, Firestone issued this statement to a Houston television station:

> We at Bridgestone/Firestone, Inc. take great pride in the quality and durability of our products and we stand behind all of them. We work hard every day to earn and maintain the loyalty and trust of our customers, and we have full confidence in the performance of our Firestone Radial ATX tires.
> Firestone has manufactured more than 12 million Radial ATX tires . . . . The Radial ATX has proved to be a reliable workhorse for U.S. Consumers. Our experience . . . indicates high consumer satisfaction with the quality and reliability of these tires.

(2) On July 26, 2000, the Wall Street Journal reported that Firestone had expressed "full confidence" in its tires. (3) On

August 1, 2000, faced with increasing calls for a recall by consumer groups, Firestone made the following statement: "We continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires. . . . Properly inflated and maintained Firestone . . . tires are among the safest tires on the road today." (4) Finally, Plaintiffs point to Firestone's statement on August 5, 2000, defending their tires as "safe."

The Court finds these statements by Firestone of general optimism and in defense of its products to be immaterial as a matter of law. *See Advanta*, 180 F.3d at 538-39 (statements that "express confidence" are not actionable as a matter of law); *see also supra* at 44-46. Further, the Court agrees with Defendants that these statements would be even less consequential to a reasonable investor in light of the fact that they were made in response to a variety of detailed, vigorous, and public attacks on Firestone's products.[15]

As in their claim against Bridgestone, Plaintiffs rely also on an omission theory of liability against Firestone. In particular, Plaintiffs allege that Firestone possessed non-public information about its tires that created an affirmative duty to disclose internal data and amend its statements. As the Court has discussed at length, even if Firestone's statements or the information it possessed were material, "materiality alone is not sufficient to place a company under a duty of disclosure." *Sofamor Danek*, 123 F.3d at 400. Rather, Plaintiffs must allege with particularity one of the following

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[15] The question of materiality must be determined in the context of all credible information available to investors at the time an alleged misrepresentation is made. *See Basic*, 485 U.S. at 248-49.

to establish that Firestone had an affirmative duty to disclose any internal information pertaining to its tires: (1) the applicability of a statute or regulation creating a duty to disclose; (2) insider trading; or (3) some prior statement of material fact that was false or misleading in light of the undisclosed information. *Digital Equip.*, 82 F.3d at 1202 n.3 (citation omitted). Because Plaintiffs do not allege the existence of insider trading by Firestone executive or of a statute or regulation mandating disclosure, they must show that one of Firestone's four statements during the Class Period was both material and misleading in light of Firestone's undisclosed information about its tires in order to avoid dismissal for failure to state a claim.

The Court does not believe any of the four statements was material, for the reasons detailed above. Even assuming at least one statement was material, however, Plaintiffs must plead with sufficient particularity facts to show that Firestone possessed information that caused it to know the statements were false or misleading, thus creating an obligation to disclose.

In general, the securities laws do not require a company "to disclose internal problems merely because those problems [are] potentially significant." *Northern Telecom*, 116 F. Supp.2d at 459 ("public disclosure of internal management and engineering problems falls outside the securities laws"). The Sixth Circuit has rejected a more stringent disclosure obligation. *Sofamor Danek*, 123 F.3d at 403.[16]

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[16] Examples of decisions in which federal courts have rejected securities fraud claims based on non-disclosure of information suggesting problems with engineering, product design, and manufacturing include the following: *Carter-Wallace I*, 150 F.3d at 157 (drug maker's failure to disclose reports of deaths and other

4. Ono's Alleged Misstatements and Omissions

Although Plaintiffs allege in conclusory fashion that Ono made material misstatements in violation of Rule 10b-5, they fail to point to a single statement made by the Defendant. Rather, as they do throughout the Complaint, Plaintiffs fail to allege particular acts by particular Defendants, opting instead for wholesale, undifferentiated allegations against all Defendants. In a securities fraud action involving multiple defendants, "the allegedly fraudulent conduct of each defendant must be set forth separately or otherwise the complaint is legally deficient under Rule 9(b)." *Envoy*, 133 F.Supp.2d at 659; *see also In re SCB Computer Tech., Inc. Sec. Litig.*, 149 F. Supp.2d 334, 345 (W.D. Tenn. 2001) ("when a plaintiff files a securities fraud action against multiple defendants, the complaint must allege specific claims against each defendant that satisfy Rule 9(b) and the PSLRA").

Far from pleading with particularity Ono's alleged misstatements, Plaintiffs have failed to allege a single misstatement or omission by Ono. This failing is fatal to Plaintiffs' claims against him. Nor can they hold him liable under any theory for Bridgestone's comments (assuming they were found actionable), which comprise the bulk of the Complaint. *See Lindblom*, 985 F. Supp. at 163; *Cent. Bank of Denver*, 511 U.S. at 177-78. Of the four Firestone statements cited by Defendants, three were reported in the media without attribution and one was attributed to a

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adverse health effects from its drugs); *Oran*, 226 F.3d at 285-86 (failure to disclose reports of side effects and deaths); *In re Union Carbide Class Action Sec. Litig.*, 648 F. Supp. 1322, 1324 (S.D.N.Y. 1986) (no duty to disclose internal report concluding high potential for accident at chemical plant).

spokeswoman. Because Plaintiffs have failed even to cite a single statement of any kind by Defendant Ono, the Court shall grant Ono's Motion to Dismiss.

B. Count II: Plaintiffs' Section 20(a) Claims Against Bridgestone and Firestone

Count II of Plaintiffs' Complaint alleges that Bridgestone and Firestone are secondarily liable as control persons under § 20(a) of the Exchange Act, 15 U.S.C. § 78t. This Court has held, "[T]o state a claim for control person liability, the Plaintiffs must, at a minimum, plead facts to establish three essential elements: (1) a primary securities law violation; (2) power to control the specific transaction or activity upon which the primary violation is predicated; and (3) actual participation . . . in the operations of the primary violator . . . ." *In re Prison Realty Sec. Litig.*, 117 F. Supp.2d 681, 692 (M. D. Tenn. 2000) citing *Sanders Confectionary Prods. v. Heller Fin., Inc.*, 973 F.2d 474, 486 (6th Cir. 1992)). Because the Court finds that Plaintiffs have failed to state a claim for primary securities law violations against any of the Defendants, it need not consider whether Bridgestone and Firestone controlled any of the other Defendants and participated in the alleged violations. Liability under Section 20(a) of the Securities Act is derivative: a control person cannot be liable under § 20(a) if the primary violator is not liable. *Comshare*, 183 F.3d at 554, n. 11; *see also Envoy*, 133 F. Supp.2d at 664 ("In the Sixth Circuit, if the predicate 10b-5 claims lack merit, then the controlling person claims under Section 20(a) fail."); *Stavroff v. Meyo*, 1997 U.S. App. LEXIS 32774, at *20 n.5 (6th Cir. Nov. 12, 1997) (Appendix Ex. 13) ("Because we have determined that there was no securities fraud committed in this case, there

was no violation of section 20(a)).[17] Thus, the Court finds that Plaintiffs have failed to state a claim against Defendants as controlling persons under Section 20(a) of the Exchange Act.

VII. CONCLUSION

Based on the foregoing, the Court rules as follows:

1. Defendant Bridgestone Corporation's Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim (Docket Entry No. 99) shall be DENIED IN PART and GRANTED IN PART. Specifically, Bridgestone Corporation's Motion to Dismiss for Lack of Jurisdiction shall be DENIED, and its Motion to Dismiss for Failure to State a Claim shall be GRANTED;

2. Defendant Yoichiro Kaizaki's Motion to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim (Docket Entry No. 102) shall be GRANTED;

3. Defendant Bridgestone/Firestone, Inc.'s Motion to Dismiss for Failure to State a Claim (Docket Entry No. 97) shall be GRANTED; and

4. Defendant Masatoshi Ono's Motion to Dismiss for Failure to State a Claim (Docket Entry No. 108) shall be GRANTED.

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[17] Although it need not determine the sufficiency of Plaintiffs' allegations that Bridgestone and Firestone controlled the individual Defendants, the Court notes that Plaintiffs have failed to plead with any particularity this element of a Section 20 claim.

There being no further pending claims before the Court, this case shall be DISMISSED.

An appropriate Order shall be entered.

/s/ _____
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:01-0017
(Consolidated Cases)

[Filed October 1, 2002]

In re BRIDGESTONE SECURITIES LITIGATION	)
	)
CITY OF MONROE EMPLOYEES RETIREMENT SYSTEM	)
	)
v.	)
	)
BRIDGESTONE CORPORATION, ET AL.	)
	)
PATRICIA ZIEMER	)
	)
v.	)
	)
BRIDGESTONE CORPORATION, ET AL.	)
	)

JUDGE ECHOLS

ORDER

For the reasons stated in the Memorandum contemporaneously entered herewith, the Court rules as follows:

1. Defendant Bridgestone Corporation's Motion to Dismiss for lack of personal jurisdiction and for failure to state a claim (Docket Entry No. 99) is DENIED IN PART and GRANTED IN PART. Specifically, Bridgestone Corporation's Motion to Dismiss for Lack of Jurisdiction is DENIED, and its Motion to Dismiss for Failure to State a Claim is GRANTED;

2. Defendant Yoichiro Kaizaki's Motion to Dismiss for lack of personal jurisdiction and for failure to state a claim (Docket Entry No. 102) is GRANTED;

3. Defendant Bridgestone/Firestone, Inc.'s Motion to Dismiss for failure to state a claim (Docket Entry No. 97) is GRANTED; and

4. Defendant Masatoshi Ono's Motion to Dismiss for failure to state a claim (Docket Entry No. 108) is GRANTED.

There being no further pending claims before the Court, this case is DISMISSED.

/s/ _____
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-5505

[Filed May 3, 2005]

CITY OF MONROE EMPLOYEES RETIREMENT SYSTEM, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff-Appellant	)
v.	)
BRIDGESTONE CORPORATION, ET AL., Defendants-Appellees.	)

BEFORE: KEITH and CLAY, Circuit Judges; and OBERDORFER,* District Judge.

* Hon. Louis F. Oberdorfer, Senior United States District Judge for the District of Columbia, sitting by designation.

ORDER

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied,

ENTERED BY ORDER OF THE COURT

** Judges Moore and Sutton recused themselves from participation in this ruling.

APPENDIX F

THE 10B-5 DAILY

News and events related to securities class action litigation. Containing all facts, with particularity, and an occasional dose of commentary.

October 22, 2004

SIXTH CIRCUIT EMBRACES COLLECTIVE SCIENTER

The "collective scienter" theory is beginning to gain a foothold in securities litigation caselaw, even if courts are not expressly acknowledging the nature of their holdings. As a general matter, whether a defendant corporation has acted with scienter (i.e., fraudulent intent) is determined by looking "to the state of mind of the individual corporate official or officials who make or issue the statement . . . rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment." *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353 (5th Cir. 2004). Another way of putting this is that courts recognize corporations only act through their officers and directors, and, therefore, can only be held liable for fraud if one or more of those individuals can be held liable for fraud. A steady trickle of decisions, however, appears to be rejecting this principle in favor of a collective scienter theory.

The U.S. Court of Appeals for the Sixth Circuit recently affirmed the dismissal of a securities class action against Ford based on statements relating to faulty tires, but the manufacturer of those tires has not been as fortunate. In *City of Monroe Employees Retirement System v. Bridgestone Corp.*, No. 03-5505 (6th Cir. 2004), the court found that some of the statements made by Bridgestone and its wholly-owned subsidiary, Firestone, were actionable. On the issue of scienter, the court examined the state of mind of the corporate entities separately from the state of mind of the sole individual defendant (Firestone's CEO). The court concluded that scienter was adequately plead against Bridgestone and Firestone, even though it failed to identify any individual officers or directors who acted with scienter. Moreover, the court rejected the scienter allegations against Firestone's CEO and affirmed the dismissal of the claims against him. Leading to the inevitable question: if an officer makes the statement and a janitor knows the statement is false, has the corporation acted with fraudulent intent?

Holding: Affirmed in part and reversed in part.

Posted by Lyle Roberts at October 22, 2004 07:59 PM

http://www.the10b-5daily.com/archives/00450.html